15-9-62

RECORD, CASE No. 14,767.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1293~~. ~~157~~ ~~159~~ 245

HENRY F. SPENCER, PLAINTIFF IN ERROR,

vs.

ALEXANDER McDOUGAL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED JULY 23, 1891.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Caption	3	1
Complaint	4	2
Summons	6	3
Answer	7	4
Judgment	8	4
Bond on writ of error	10	5
Bill of exceptions	12	6
Evidence for plaintiff	12	6
Statement of laws, &c., offered	12	7
Deed of division of land grant of June 5, 1856	13	7
Statement of laws, &c., offered	14	8
Testimony of Simeon Mills	18	10
D. C. Fulton	19	10
Endorsements on maps showing limits, &c.	19	11
Notices and orders of withdrawal	21	11
Statement of further evidence	23	13
Patent from State of Wisconsin to C., St. P., M. & O. R. R. Co.	24	13

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	Original.	Print.
Statement of further evidence offered	32	18
Agreement between W. C. R. R. Co. and C., St. P., M. & O. R. R. Co., February 12, 1884	33	19
Testimony of J. F. Van Dooser	38	22
Louis Oettel	40	23
Extract from tract book	41	23
Evidence for defendant	42	23
Statement of laws, &c., offered	42	23
Declaratory statement of David J. Cooper	42	24
Abstract of declaratory statements at Hudson	44	25
Declaratory statement of Christiana Mautshke	46	26
Abstract of declaratory statements at Hudson	47	27
Order to register and receiver at Ashland, January 8, 1891	49	28
Testimony of E. E. Brossard	52	29
Judge's certificate to bill of exceptions	54	31
Citation	55	31
Proof of service of citation	56	31
Clerk's certificate	57	31
Assignment of errors	58	32

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Henry F. Spencer, plaintiff, and Alexander McDougal, defendant, manifest error hath happened, to the great damage of the said Henry F. Spencer, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-seventh day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART,
Clerk Circuit Court.

S. U. PINNEY, *Attorney.*

[Endorsed:] Supreme Court of the United States. Henry F. Spencer *vs.* Alexander McDougal. Writ of error. S. U. Pinney, attorney.

2 The return of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Madison, this 29th day of June, A. D. 1891.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART, *Clerk.*

3 Circuit Court of the United States of America for the Western District of Wisconsin.

UNITED STATES OF AMERICA, *Western District of Wisconsin,* } *ss:*

At a special term of the circuit court of the United States for the

western district of Wisconsin, begun and held, according to law, at the city of Madison, in said district, on the third Tuesday, being the sixteenth day, of June, A. D. 1891—present and presiding, the Hon. Romanzo Bunn, district judge—among other, the following proceedings were had, to wit:

HENRY F. SPENCER, Plaintiff,
vs.
ALEXANDER MCDOUGAL, Defendant. } At Law.

Be it remembered that heretofore, to wit, on the fifth day of April, 1891, came the above-named plaintiff, by his attorneys, Messrs. Pinney & Sanborn, and filed his complaint in an action for the recovery of real estate against the above-named defendant as follows, to wit

4 Circuit Court of the United States for the Western District of Wisconsin.

HENRY F. SPENCER, Plaintiff,
vs.
ALEXANDER MCDOUGAL, Defendant.

The complaint of the above-named plaintiff respectfully shows to this court—

That the plaintiff is a citizen of the State of Massachusetts, residing in the city of Boston, in said State, and that the above-named defendant, Alexander McDougal, is a citizen of the State of Wisconsin.

And the above-named plaintiff complains against the above-named defendant and alleges that the said plaintiff has an interest or estate in and to the east half of the southwest quarter and the east half of the northwest quarter of section number seven (7), in township number forty-seven (47) north, of range number four (4) west, in the county of Ashland and State of Wisconsin, namely, that he is the owner thereof in fee simple absolute, and that he is now entitled to the possession of said premises; that said premises are of the value of $9,000, and that the above-named defendant is now in possession of the same and unlawfully withholds possession thereof from the said plaintiff and claims title thereto, to his damage in the sum of ($1,000.00) one thousand dollars.

Wherefore the said plaintiff demands judgment against the above-named defendant that he recover possession of said premises and his said damages for the unlawful withholding thereof, together with the costs and disbursements of this action, and that he may have such further or other judgment or relief as shall be just
5 and proper.

PINNEY & SANBORN,
Pl'ff's Att'ys, Madison, Wis.

WESTERN DISTRICT OF WISCONSIN, *ss:*

S. U. Pinney, of the city of Madison, in said district, being duly

sworn, says that he is a member of the law firm of Pinney & Sanborn, who are attorneys for the plaintiff in the above-entitled action; that the said plaintiff is not now within the State of Wisconsin, where his said attorneys reside, and therefore the affidavit of verification of said complaint is made by this deponent. Deponent further says that the knowledge and grounds of the belief of this deponent on the subject of the foregoing complaint consists of information transmitted to him by and on behalf of said plaintiff and statements made to this deponent by Frederick Abbot, of Milwaukee, Wisconsin, the agent of the said plaintiff, which said statements and information this deponent verily believes to be true; that deponent has read the foregoing complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

S. U. PINNEY.

Subscribed and sworn to before me this 17th day of February, 1891.

J. M. REED,
Notary Public, Wis.

Filed Feb'y 17, 1891.

F. M. STEWART, *Clk.*

6 Whereupon a summons issued as follows:

Circuit Court of the United States for the Western District of Wisconsin.

HENRY F. SPENCER, Plaintiff,
vs.
ALEXANDER MCDOUGAL, Defendant.

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which will be filed in the office of the clerk of this court, at Madison, Wisconsin, and of which a copy is herewith served upon you.

And you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 17th day of February, in the year of

our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

F. M. STEWART, *Clerk.*

PINNEY & SANBORN,
Plaintiff's Attorneys.

P. O. address, Madison, Dane Co., Wis.

7 And afterwards and on the 11th day of March, A. D. 1891' came the said defendant, by his attorneys, and filed his answer to said complaint as follows, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

HENRY F. SPENCER, Plaintiff,
vs.
ALEXANDER MCDOUGAL, Defendant.

The above-named defendant, by his attorneys, Brossard and Colignon, answering the complaint of the above-named plaintiff, admits the facts of citizenship as alleged in said complaint; and the defendant further admits that he is in the actual possession of the premises described in the complaint herein, and that he claims title thereto.

Said defendant, furthering answering said complaint, denies that the plaintiff is the owner of the east half (½) of the west half (½) of section number seven (7), in township number forty-seven (47) north, of range number four west, in the county of Ashland, or any part thereof, in fee simple absolute. Said defendant further denies that said plaintiff has any interest or estate whatever in the above-described premises, and further denies that said plaintiff is entitled to the possession of the same.

And said defendant further denies each and every allegation contained in said complaint not hereinbefore expressly admitted or controverted.

Wherefore said defendant demands judgment against said plaintiff for his costs and disbursements in this action and such other and further relief as in the premises he may be entitled

8 to.

BROSSARD & COLIGNON,
Defendant's Attorneys, Ashland, Wis.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Alexander McDougal, being duly sworn, says that he resides in Ashland county, State of Wisconsin; that he is the defendant in the above-entitled action; that he has heard read the above and foregoing answer and knows the contents thereof, and that the same is true to his own knowledge.

Subscribed and sworn to before me this 9th day of March, 1891.

[NOTARIAL SEAL.] E. E. BROSSARD,
Notary Public, Ashland County, Wisconsin.

Endorsed as follows: "Due and sufficient service of within answer admitted this 11th day of March, 1891. Pinney & Sanborn, pl'ff's att'ys. Filed March 11, 1891. F. M. Stewart, cl'k."

And at the June special term of said court, A. D. 1891, to wit, on the 26th day of June, A. D. 1891, the same being the tenth day of said term, in the record of the proceedings of said court the following proceedings, among others, were had, to wit:

HENRY F. SPENCER, Plaintiff,
vs.
ALEXANDER MCDOUGAL, Defendant.

This day come the respective parties, by their counsel, and this cause comes on to be tried before the court and a jury duly impanneled, tried, and sworn, and trial commenced June 27, A. D. 1891. This day come the parties, and the trial is concluded,
9 and the court thereupon directed a verdict for the defendant, and such verdict is thereupon rendered and returned as follows: "We, the jury, find for the defendant, and find the value of the land described in the complaint to be sixteen thousand dollars."

Whereupon it is considered and adjudged by the court now here that the said plaintiff take nothing by this action; that the defendant go thereof without day, and that the defendant, Alexander McDougal, do have and recover of the plaintiff, Henry F. Spencer, forty-three dollars and twenty cents for his costs, and that the defendant have execution therefor.

Costs, $43.20. Judgment-roll sealed June 27, 1891.

F. M. STEWART, *Clerk.*

Afterwards, on the said 27th day of June, A. D. 1891, the following bill of exceptions was duly allowed and filed in said cause—that is to say:

10 And afterwards, on the 29th day of June, 1891, came said plaintiff, by his attorneys, and filed his bond on appeal in the words and figures following, to wit:

Know all men by these presents that we, De Witt C. Ramsay and Herman T. Lerdall, of the city of Madison, Wisconsin, are held and firmly bound unto Alexander McDougal in the full and just sum of five hundred dollars ($500.00), to be paid to said Alexander McDougal, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at the circuit court of the United States in the western district of Wisconsin, in a suit depending in said court between Henry F. Spencer, plaintiff, and Alexander McDougal, de-

fendant, judgment was rendered against the said Henry F. Spencer, and the said Henry F. Spencer having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alexander McDougal, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington on the twenty-seventh day of July next:

Now, the condition of the above obligation is such that if the said Henry F. Spencer shall prosecute his said writ to effect and answer all damages and costs if he shall fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

DE WITT RAMSAY. [SEAL.]
H. T. LERDALL. [SEAL.]

Sealed and delivered in presence of—
W. A. P. MORRIS.

11 WESTERN DISTRICT OF WISCONSIN, *ss:*

De Witt C. Ramsay and Herman T. Lerdall above named, being duly sworn, each for himself says that he is worth the sum of one thousand dollars over and above all debts by him owing and all exemptions by law, in property situated in the State of Wisconsin liable to execution; and further saith not.

DE WITT RAMSAY.
H. T. LERDALL.

Subscribed and sworn before me this 29th day of June, 1891.
W. A. P. MORRIS,
U. S. Court Commissioner, Western Dist. of Wisconsin.

Endorsed as follows: "The within bond and sureties approved this 29th day of June, 1891. R. Bunn, dist. judge. Filed June 29, 1891. F. M. Stewart, cl'k."

12 Circuit Court of the United States for the Western District of Wisconsin, Special June Term, at Madison, in said District, Begun and Held on the 16th Day of June, A. D. 1891.

HENRY F. SPENCER, Plaintiff,
vs.
ALEXANDER MCDOUGAL, Defendant.

Be it remembered that heretofore, to wit, at the term of said court aforesaid and on the tenth day of said term, namely, the 26th day of June, A. D. 1891, this action came on to be tried before said court and a jury duly impaneled and sworn for that purpose, the Hon. Romanzo Bunn, district judge, presiding.

And thereupon the plaintiff, to maintain and prove the said issues on his part, called the attention of the court to the grants mentioned in the acts of Congress specified in the complaint in this action,

namely, the act of Congress of June 3, 1856, and the act of Congress of May 5, 1864, granting lands to the State of Wisconsin for certain railroad purposes therein specified.

Thereupon the said plaintiff, to maintain said issues on his part, offered and gave in evidence:

(1.) Chapter 118 of the Laws of Wisconsin for 1856, entitled "An act to accept the grant and execute the trust conferred upon the State of Wisconsin by an act of Congress entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3, 1856." Laws of Wisconsin for 1856, page 137, approved October 8, 1856.

(2.) Chapter 122 of the Laws of Wisconsin for 1856, page 217, approved October 11, 1856, entitled "An act to grant certain lands to the La Crosse & Milwaukee Railroad Company and to execute the trust created by an act of Congress entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of
13 railroads in said State,' approved June 3, 1856."

(3.) Chapter 230 of the Laws of Wisconsin for 1857, page 529, approved March 5, 1857, entitled "An act to amend an act entitled 'An act to incorporate the Saint Croix and Lake Superior Railroad Company,' approved February 24, 1854."

(4.) A deed of division of the land grant of June 3, 1856, between the La Crosse & Milwaukee Railroad Company and the Saint Croix & Lake Superior Railroad Company, dated March 10, 1857, recorded in the office of the secretary of state of Wisconsin November 19, 1857, whereby "the party of the first part bargained, sold, released, conveyed, assigned, set over, and forever quitclaimed to the said party of the second part all the estate, real, personal, and mixed, embraced and described in a certain indenture made and executed in duplicate on the nineteenth day of February, one thousand eight hundred and fifty-seven, between the said parties, * * * and also all that portion and route of a certain railroad authorized by the aforesaid act of the legislature approved October 11, 1856, to be built by the said party of the first part, lying and — between such points on the St. Croix river or lake between townships twenty-five and thirty-one as shall be designated by the said party of the first part and the west end of Lake Superior and from any point on the said last aforesaid route to Bayfield, together with all the power to survey, locate, and construct, complete, perpetually to have, use, maintain, and operate railroads with one or more tracks or lines thereon," etc., etc.; "and the said party of the first part, for the consideration aforesaid, does hereby sell and convey to the said party of the second part all the interest of the said party of the first part in and to every
alternate section of land, designated by odd numbers, for six
14 sections in width on each side of said road from the point aforesaid on the St. Croix river or lake to the west end of Lake Superior and from any point on said last aforesaid route to Bayfield, together with such lands within fifteen miles of the line or route *with such lands within fifteen miles of the line or route* of said road or roads as shall be selected in pursuance of said act of Con-

gress in lieu of any sections or parts of sections which shall have been sold by the United States or to which the right of pre-emption has attached; but it is hereby expressly understood between the parties hereto that the said La Crosse & Milwaukee Railroad Company possesses and does not surrender or release the right of selecting any lands within fifteen miles of and more than six miles from the route of the said road or roads between the St. Croix river or lake and the west end of Lake Superior, and also between the said route and Bayfield, for the purpose of making up any deficiency which does or may exist in the quantity of lands to which the said La Crosse & Milwaukee Railroad Company is or may be entitled upon that point of its line extending from Madison to the St. Croix river or lake."

(5.) Chapter 233 of the Private and Local Laws of Wisconsin of 1861, page 333, approved April 12, 1861, entitled "An act to amend chapter 299 of the Laws of 1855, entitled 'An act to incorporate the Sugar River Valley Railroad Company, and the acts amendatory thereto, and to repeal and annul a portion of a grant of land heretofore made to the La Crosse & Milwaukee Railroad Company.'"

(6.) Chapter 243 of the Laws of Wisconsin for 1863, page 47, approved April 1, 1863, entitled "An act to incorporate the Tomah & Lake St. Croix Railroad Company and to repeal and annul a portion of a grant of land heretofore made to the La Crosse & Milwaukee Railroad Company."

(7.) A duly certified copy of the map of definite location of the branch line of the St. Croix and Lake Superior railroad to Bayfield, filed in the General Land Office July 17, 1858, duly certified by the Commissioner of the General Land Office, together with endorsements on it, from which it appears that the lands in question are within ten miles of the located line of said branch, and that the location of said line in the field opposite said land was made May 10, 1858. Said map is marked "Henry F. Spencer against Alexander McDougal, June 26, 1891, R. Bunn, district judge," for identification and is transmitted and produced at the hearing as a part of the record in this action.

(8.) Joint resolution of the legislature of Wisconsin of March 20, 1865, approved same date, Laws of Wisconsin for 1865, page 689, by which the State accepted the said grant of May 5, 1864, subject to all the conditions of said act of Congress and consented to execute the trust created by the aforesaid act, pursuant in all things to the terms, limitations, and conditions of said act; and also a resolution of the St. Croix and Lake Superior Railroad Company adopting the said location of its main and branch line under the act of Congress of June 3, 1856, as its location of line under the act of May 5, 1864, passed by the company April 22, 1865.

(9.) Chapter 174 of the Laws of Wisconsin for 1865, page 153, approved March 20, 1865, entitled "An act to aid the St. Croix and Lake Superior Railroad Company in reaffirming the grant of lands by act of Congress approved June 3, 1856, and other purposes."

16 (10.) Chapter 175 of the Laws of Wisconsin for 1865, page 154, approved March 20, 1865, entitled "An act to confer on the St. Croix & Lake Superior Railroad Company all the rights and privileges granted and conferred to the State of Wisconsin by acts of Congress approved June 3, 1856, and May 5, 1864."

(11.) Chapter 84 of the Laws of Wisconsin for 1869, page 80, approved March 5, 1869, entitled "An act to repeal chapter 174, General Laws of 1865, entitled 'An act to aid the St. Croix and Lake Superior Railroad Company.'"

(12.) Chapter 90 of the Laws of Wisconsin for 1869, page 85, approved March 5, 1869, entitled "An act to repeal chapter 175, General Laws of 1865, pertaining to the St. Croix and Lake Superior Railroad Company."

(13.) Chapter 407 of the Laws of Wisconsin for 1869, page 963, approved March 10, 1869, entitled "An act to incorporate the Bayfield & St. Croix Railway Company."

(14.) Chapter 83 of the Laws of 1872, page 176, approved March 22, 1872, entitled "An act to repeal chapter 74 of the Private and Local Laws of 1854, entitled 'An act to incorporate the St. Croix & Lake Superior Railroad Company, and acts amendatory thereof.'"

(15.) Chapter 89 of the Private and Local Laws of Wisconsin for 1872, page 181, approved March 22, 1872, entitled "An act to repeal chapter 175 of the General Laws of 1865, entitled 'An act to confer upon the St. Croix and Lake Superior railroad all the rights and privileges granted and conferred to the State of Wisconsin by acts of Congress of June 3, 1856, and May 5, 1864.'"

(16.) Chapter 120 of the Private and Local Laws of Wis-
17 consin for 1872, page 314, approved March 25, 1872, entitled "An act to repeal chapter 51 of the Private and Local Laws of 1869, entitled 'An act to incorporate the Northern Wisconsin Railway Company.'"

(17.) Chapter 121 of the Private and Local Laws of Wisconsin for 1872, page 314, approved March 25, 1872, entitled "An act to repeal chapter 510 of the Private and Local Laws of 1870, entitled 'An act to perpetuate the charter of the Northern Wisconsin Railway Company.'"

(18.) Chapter 137 of the Private and Local Laws of Wisconsin for 1872, page 339, approved March 25, 1872, entitled "An act to repeal chapter 500 of the Private and Local Laws of 1870, entitled 'An act to perpetuate the Bayfield and St. Croix Railway Company.'"

(19.) Chapter 138 of the Private and Local Laws of Wisconsin for 1872, page 339, approved March 25, 1872, entitled "An act to repeal section 19 of chapter 407 of the Private and Local Laws of 1869, entitled 'An act to incorporate the Bayfield and St. Croix Railway Company.'"

(20.) Chapter 126 of the Laws of Wisconsin for 1874, page 186, entitled "An act to confer certain lands upon the North Wisconsin Railway Company, to the Chicago & Northern Pacific Air Line Railway Company, and to execute the trust assumed by the State of Wisconsin by its acceptance of the grants of lands made by Con-

gress by acts approved June 3, 1856, and May 5, 1864," approved March 4, 1874.

And it was thereupon admitted that the North Wisconsin Company gave the bond required by said act upon its acceptance of the provisions thereof.

(21.) Plaintiff gave in evidence, by consent, the testimony
18 of Simeon Mills and Maj. D. C. Fulton, taken in the case of The Wisconsin Central Railroad Company against William O. Forsythe, with like effect as if taken in this cause, subject to objection as to its competency and materiality; which said testimony is as follows:

SIMEON MILLS testified:

I reside in the city of Madison, Wisconsin; have resided there fifty-two or fifty-three years. I remember a corporation known as the Sugar River Valley Railroad Company. At one time I was one of its directors. I have some indistinct recollection of the effort this company made to build a road from Madison to Portage City and obtain a land grant. This was a good many years ago. I think I was connected with it from the early part of 1862 for some time over a year. I do not recollect how long; perhaps two years. I think there was a provision in the land-grant act that required them to expend $50,000 within a certain year and to complete the road by 1863. It did not, to my knowledge, ever complete any road at all. I have not any distinct recollection now whether it expended $50,000 during the year mentioned. I made a deposition in the land-grant case in which I stated the amount expended, but I do not remember what it was.

Question. You said the greater portion of it was in Columbia county, but some in Dane. "The Sugar River Valley Railroad Company may have spent in the neighborhood of $25,000; along there." I call your attention to this to refresh your memory; also, "I understand the lack of confidence and money prohibited the resuming of work." What do you remember about those facts?

Answer. I remember that statement was made under oath some
ten or twelve years ago. I have no distinct recollection about
19 the facts now.

Question. Did you then remember it so as to know it was true?

Answer. I did; yes, sir. I read it over this morning and I know it was true, although I have no distinct recollection from the fact itself. There was no road completed from Madison to Portage or from Madison to Tomah before May 5, 1864. There was a road from Madison to Chicago, I think, that had been completed here earlier than that time; it was the Madison and Beloit Railway.

Maj. D. C. FULTON testified:

I reside at Hudson, St. Croix county, Wisconsin; have lived there thirty-six years. There was no part of the land-grant road built or constructed beyond Hudson up towards Lake Superior prior

to May 5, 1864, or northwest of Tomah, and no part of the branch to Bayfield. The main line was constructed through to Lake St. Croix in the spring of 1871, and they commenced building up towards New Richmond, on the Northern division. I cannot tell exactly, but a little later; quite a number of years later. That construction of the road from Tomah to the Lake St. Croix was by way of Black River Falls, through Jackson county, under the act of 1864, and did not come around by La Crosse. It was on the new line, or Baldwin line, as it was called.

(22.) Plaintiff then gave in evidence a duly certified diagram map from the General Land Office, at Washington, together with the endorsements thereon, showing the land limits of the respective land grants under the acts of June 3, 1856, and May 5, 1864, and that the lands in question are within the increased place limits of the Bayfield branch under the act of May 5, 1864, and within ten miles of the line of its definite location, and also within the place limits of the road of which the Wisconsin Central Railroad Company is the successor under the third section of that act.

20 The endorsements on said map are as follows: "The line of survey of the St. Croix and Lake Superior railroad and branch to Bayfield, as shown on this diagram, was located by resolution of the board of directors of the company passed November 2, 1857, in the field between that date and June 10, 1858. The company adopted the same line upon which to make selections under the act of May 5, 1864. In view of the act of June 3, 1866, all the lands in the State were withdrawn from market by telegrams to the district land officers, dated May 29, 1856, followed by letters dated June 12, 1856. After the definite location of the roads under date of March 13, 1858, diagrams were transmitted to those officers showing the established six and fifteen mile limits as shown herewith and the lands outside the fifteen-mile limits released from withdrawal and even sections between the six and fifteen mile limits restored to market, per public notice No. 594; even sections within six-mile limits offered at $2.50 per acre, per proclamation No. 628, dated May 21, 1858. Under act of May 5, 1864, the withdrawal for the St. Croix and Lake Superior road was extended to ten and twenty mile limits by diagrams and instructions transmitted to the district officers February 28, 1866." The Commissioner of the General Land Office certifies that the diagram "correctly delineates the lines of survey and the established limits of the lands granted for the railroads thereon designated, as shown by the files and records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on this 23rd day of March, A. D. 1875.

[SEAL.] S. S. BURDETT,
Commissioner."

Said diagram map is marked for identification "Wisconsin
21 Central Railroad Company against William O. Forsythe

June 12, 1891, No. 2, Romanzo Bunn, district judge," and will be produced at the hearing as part of the record in this cause.

(23.) The plaintiff then put in evidence notices and orders of withdrawal given by the Commissioner of the General Land Office to the land officers of the several land district- in the State of Wisconsin at and about the time of the date of said notices and orders respectively as follows:

"A."

"GENERAL LAND OFFICE, *May* 29, 1856.

Reg'r and receiver, La Crosse, Wisconsin:

You will suspend from sale and location all the lands in your district until further orders.

Acknowledge the receipt of this despatch by telegraph and mail.

THOS. A. HENDRICKS,
Commissioner."

"B."

"GENERAL LAND OFFICE, *June* 12, 1856.

Reg's and rec'v'r, Mineral Point, Wisconsin.

GENTLEMEN: By my telegraphic despatch of the 29th ult. you were requested to suspend from sale or location until further orders all the lands in your districts. The object of this withdrawal was to protect the lands from sale granted to the State for railroad purposes by a bill which has passed both houses of Congress, which having been approved by the President on the 3d instant and thus become a law, I have to request that you will continue the reservation until otherwise directed.

The governor has this day been advised and requested to furnish, in advance, sketch maps of the route of the roads, with a view to releasing as many of the lands as can be safely returned
22 without interfering with the public limits of selection, and also of the maps of actual final locations, on the receipt of which latter a further reduction may be made.

Acknowledge the receipt of these instructions by mail, giving the date of their reception at your office.

I am, very respectfully, your ob't serv't,

THOS. A. HENDRICKS,
Commissioner."

"C."

Order of the Commissioner of the General Land Office, dated October 26, 1856, to the registers and receivers of the several land offices, instructing them as follows: "Upon the filing in your office of duly certified map of the line of route as definitely fixed or any of the roads referred to in the act entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in such State,' approved June 3, 1856, you will, without waiting for further instructions from this office, cease to permit locations by

entries or pre-emption or for any purpose whatever of the land within fifteen miles of said route."

"D."

Order of the Commissioner of the General Land Office given to the said officers of the said several land offices in the State, dated March 1, 1859, as follows:

"GENTLEMEN: For your information in the matter, I enclose herewith a diagram of the district of lands subject to sale at your office, upon which has been designated the line of route of the lines of the six and fifteen mile limits of the St. Croix and Lake Superior and the Bayfield line of railroads, to aid in the construction of which a grant of land was made to the State of Wisconsin by act
23 of June 3, 1856. As all the vacant tracts in the odd-numbered sections outside the six and within the fifteen mile limits of the road have been selected by the agent of the State in lieu of the lands sold and pre-empted in the alternate sections granted by the above-mentioned act, such tracts you will, of course, continue to reserve as heretofore from sale or location for any purpose whatever.

THOMAS A. HENDRICKS,
Commissioner."

(24.) The plaintiff then gave in evidence certified copies of proofs of completion of the fifth, sixth, seventh, and eighth sections of twenty miles each of the Bayfield road, pursuant to the provisions of the act of Congress, showing that the branch was completed to Bayfield by June 19, 1882. Said fifth and sixth sections were completed prior to June 2, 1881, and the lands in question are coterminous with the seventh and eighth sections. Said evidence consisted of certified copies of said proofs from the office of the Commissioner of the General Land Office filed on or about the dates last aforesaid.

(25.) The plaintiff gave in evidence articles of consolidation of the Chicago, St. Paul, Minneapolis Railway Company with the North Wisconsin Railway Company, dated May 25, 1880, filed in the office of the secretary of state of Wisconsin May 26, 1880, and recorded in volume four of Railroad Mortgages, pages 389–414, whereby said two companies became consolidated into a new company under the name of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and whereby also said last-named company succeeded to all and singular the right, title, and interest of the said North Wisconsin Railway Company in and to said land grants and became its successor in interest therein.

(26.) The plaintiff then gave in evidence a certified copy
24 of patent from the State of Wisconsin to the Chicago, St. Paul, Minneapolis & Omaha Railway Company for the lands in question, dated April 23, 1885, and recorded in the office of the secretary of state on the same date. Said patent is as follows:

UNITED STATES OF AMERICA, }
The State of Wisconsin. }

Jeremiah M. Rusk, governor, to all to whom these presents shall come, Greeting:

Whereas by an act of Congress of the United States approved June 3rd, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," certain lands were granted to the State of Wisconsin to aid in the construction of railroads; and

Whereas by an act of the legislature of the State of Wisconsin approved October 8th, 1856, entitled "An act to accept the grant and execute the trust conferred upon the State of Wisconsin by an act of Congress entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,'" said grant was accepted upon the terms, conditions, and restrictions contained in said act of Congress, and the trust created by the said act of Congress was assumed and undertaken by said State of Wisconsin; and

Whereas by an act of the legislature of the State of Wisconsin approved October 11th, 1856, entitled "An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3rd, 1856," all the interest and estate, present and prospective, of the State of Wisconsin in or to any and all the lands granted to said State by said act of Congress were granted to the La Crosse and Milwaukee Railroad Company under certain conditions and provisions therein contain-; and

Whereas the La Crosse and Milwaukee Railroad Company failed to comply with the conditions and provisions of said grant contained in said last-mentioned act, and, by the provisions of said act, title to such of the lands granted as aforesaid as are hereinafter described did not vest in said company; and

Whereas by an act of the Congress of the United States approved May 5th, 1864, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," among other things, the time fixed and limited for the completion of said roads in the act aforesaid of June 3rd, 1856, was extended to a period of five years from and after the passage of said last-named act, and additional lands were granted to aid in the construction of a railroad from a point on Saint Croix river or lake between townships twenty-five (25) and thirty-one (31) to the west end of Lake Superior, and from some point on the line of said railroad to be selected by said State to Bayfield; which said additional grant was duly accepted by the legislature of the State of Wisconsin; and

Whereas, on the 17th day of November, A. D. 1871, the North Wisconsin Railway Company became and was duly organized as a railway corporation under and pursuant to the provisions of chapter 73 of the Revised Statutes of the State of Wisconsin; and

Whereas by an act of the legislature of the State of Wisconsin approved March 4th, 1874, entitled "An act to confer certain
26 lands upon the North Wisconsin Railway Company and the Chicago and Northern Pacific Air Line Railway Company, and to execute the trusts assumed by the State of Wisconsin by its acceptance of the grants of land made by Congress by acts approved June 3rd, 1856, and May 5th, 1864," there was granted to the North Wisconsin Railway Company all the right, title, and interest which the State of Wisconsin then had or might thereafter acquire in and to the lands granted to said State in and by the two acts of Congress hereinbefore named to aid in the construction of a railroad from the St. Croix river or lake between said townships twenty-five (25) and thirty-one (31) to the west end of Lake Superior and Bayfield, except those lands granted in aid by said last-named act of the legislature of said State to the Chicago and Northern Pacific Air Line Railway Company upon the conditions and provisions contained in said last-named act; and

Whereas by the third section of said last-named act of the legislature of the State of Wisconsin the governor of said State is authorized and directed, upon presentation to him of satisfactory proof that the first forty continuous miles of the said The North Wisconsin Railway Company's road have been completed in accordance with said act of Congress and with said last-named act of the legislature, to issue and deliver or cause to be issued and delivered to said The North Wisconsin Railway Company patents in due form from said State for five hundred and twenty sections of land, and thereafter, upon the completion of any twenty continuous miles of said road, to issue and deliver or cause to be issued and delivered to said The North Wisconsin Railway Company patents in due form for two hundred sections of said land; and

27 Whereas within sixty days after the passage of said last-named act of the legislature of said State the said The North Wisconsin Railway Company duly filed with the secretary of state a resolution, duly adopted by its board of directors, accepting said grant upon the terms and conditions in said last-named act contained, and did also within sixty days duly execute to the State of Wisconsin and deposit with the State treasurer a bond, with two or more sureties, approved by the governor, and conditioned as in the fourth section of said act required; and

Whereas the said The North Wisconsin Railway Company did, proceeding with the construction of its railway, in accordance with said acts of Congress and with said last-named act of the legislature, complete, in addition to the first forty continuous miles thereof (the completion of which was duly certified by the governor of said State to the Secretary of the Interior on the 15th day of December, A. D. 1874), forty continuous miles thereof, the same being the third and fourth twenty continuous mile sections of said railway, beginning at the northerly end of said first forty continuous miles and thence extending continuously towards Bayfield aforesaid to station 1056, on section twenty-one (21), township thirty-nine (39) north, of range twelve (12) west, in the county of Burnett, and did present to the

governor of said State satisfactory proof of such completion, in accordance with the provisions of said act of Congress approved May 5th, 1864, who did, on the 7th day of July, A. D. 1879, duly certify to the Secretary of the Interior, in accordance with the requirements of law, the fact of the completion of said third twenty continuous mile sections of said railway, and who did, on the 12th day
28 of May, A. D. 1880, duly certify to the Secretary of the Interior, in accordance with the requirements of law, the fact of the completion of the said twenty continuous mile section of said railway; and

Whereas the said The North Wisconsin Railway Company and the Chicago, St. Paul and Minneapolis Railway Company (the last named likewise being a corporation organized and existing under the laws of Wisconsin) did, on the 25th day of May, A. D. 1880, duly enter into articles of consolidation pursuant to section 1833 of the Revised Statutes of said State for the year 1878, as amended by chapter 260 of the Laws of said State for the year 1880 (which said articles took effect on the 26th day of May, 1880), by which consolidation a new corporation was duly created by the name of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (the grantee herein), and which said last-named company became, by the terms of said articles of consolidation and the conveyances and assignments therein contained and thereby made and by virtue of said laws last named, the successor of the said The North Wisconsin Railway Company and entitled to construct and complete the railways which the said The North Wisconsin Railway Company was entitled to construct and complete and to earn by said construction and to demand and receive patents for all lands which the said The North Wisconsin Railway Company was entitled to earn and receive by the completion of its railway as aforesaid; and

Whereas the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, as the successor of the said The North Wisconsin Railway Company as aforesaid, has heretofore, proceeding with the construction of said railway, completed forty (40) continuous miles thereof towards Bayfield as aforesaid, the same being the
29 fifth (5th) and sixth (6th) twenty (20) continuous mile sections of said railway, the said sixth (6th) twenty (20) continuous mile section thereof ending at station 2112, on section eighteen (18), township forty-three (43) north, of range seven (7) west, in the county of Bayfield, and did present to the governor of said State satisfactory proof of such completion, in accordance with the provisions of the act of Congress approved May 5th, 1864, who did, on the third day of June, A. D. 1881, duly certify to the Secretary of the Interior, in accordance with the requirements of law, the fact of the completion of said fifth and sixth twenty continuous mile sections of said railway; and

Whereas the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, as the successor of the said The North Wisconsin Railway Company as aforesaid, has heretofore, proceeding with the construction of said railway, completed twenty additional miles of said railway toward Bayfield as aforesaid, the same being the seventy

twenty continuous mile section of said railway, the said seventh twenty mile section thereof ending at station 1056, on section fourteen (14), township forty-five (45) north, of range six (6) west, in the county of Bayfield, in said State, and did present to the governor of said State satisfactory proof of such completion, in accordance with the requirements of the act of Congress approved May 5th, 1864, who did, on the 26th day of June, A. D. 1882, duly certify to the Secretary of the Interior, in accordance with the requirements of law, the fact of the completion of the said seventh twenty continuous mile section of said railway; and

Whereas the said Chicago, St. Paul, Minneapolis and Omaha
30 Railway Company has, as the successor of the said The North Wisconsin Railway Company as aforesaid, heretofore completed thirty-eight and $\frac{38}{100}$ additional continuous miles of said railway towards Bayfield as aforesaid, the said thirty-eight and $\frac{38}{100}$ additional miles completing the said railway to Bayfield, on Lake Superior, the said thirty-eight and $\frac{38}{100}$ miles being hereinafter more particularly described, and has heretofore presented to the governor of said State satisfactory proof of such completion, in accordance with the provisions of said act of Congress approved May 5th, 1864; and

Whereas the said governor did, on the third day of December, A. D. 1883, duly certify to the Secretary of the Interior, in accordance with the requirements of law, the fact of the completion of the said thirty-eight and $\frac{38}{100}$ continuous miles of said railway, beginning at station 1056, on section fourteen (14), township forty-five (45) north, of range six (6) west, and ending at station 1884 x 61 on Fant avenue, in the village of Bayfield, where said avenue intersects First street, in the county of Bayfield, in said State; and

Whereas by the completion of said last-named section the Chicago, St. Paul, Minneapolis and Omaha Railway Company and its predecessor, the North Wisconsin Railway Company, have completed, in accordance with said act of Congress and said act of the legislature of the State of Wisconsin, all the railway mentioned in section one (1) of the said act of Congress approved May 5th, 1864, between the St. Croix river or lake and Bayfield, and has hereby become entitled to demand and receive patents for all the lands granted by and inuring to said State by and under the said
31 acts of Congress approved, respectively, June 3rd, 1856, and May 5th, 1864, amongst which are the lands hereinafter described:

Now, therefore, Know ye that the State of Wisconsin, in consideration of the premises and in pursuance of said several acts of Congress and of the legislature of said State, has given and granted, and by these presents doth hereby give, grant, and convey, unto the Chicago, St. Paul, Minneapolis and Omaha Railway Company aforesaid, and to its successors and assigns, all and singular the following-described lands:

(The patent describes a great number of tracts of land, and among others the premises in controversy), containing in all thirty-eight

thousand nine hundred and seventy and $\frac{74}{100}$ acres, as per Government survey:

To have and to hold the said lands above described, with all the rights, privileges, and appurtenances thereunto belonging or in anywise appertaining, unto the said Chicago, Saint Paul, Minneapolis and Omaha Railway Company, its successors and assigns, in fee simply forever.

In testimony whereof I, Jeremiah M. Rusk, governor of the State of Wisconsin, have caused these letters to be made patent and the great seal of the State of Wisconsin to be hereunto affixed. Given under my hand at the capitol, in the city of Madison, this twenty-third day of April, in the year of our Lord, one thousand eight hundred and eighty-five.

[GREAT SEAL.]

By the governor:

J. M. RUSK.

ERNST G. TIMME,
Secretary of State.

Received and recorded April 23, 1885.

32 (27.) Plaintiff then gave in evidence a deed from the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the plaintiff of the lands in question, dated June 24, A. D. 1885, recorded the 24th day of September, 1885, in volume eighteen of Deeds, on page 506, in the register's office for Ashland county. The said deed, in consideration of one dollar, grants, bargains, sells, and conveys unto the said party of the second part, his heirs and assigns, all that certain piece or parcel of land described, according to the United States survey thereof, as follows, to wit: The west fractional half of section seven (7), in township forty-seven north, of range four (4) east, in the county of Ashland and said State, and all the right, title, and estate of the party of the first part in and to the same; to have and to hold, etc., etc., and was duly witnessed and acknowledged.

The defendant objected to said deed being received on the ground that the grantor railway company at the time it was executed had no title to convey, but the court overruled the objection, and said deed was received in evidence.

(28.) The plaintiff then offered and gave in evidence decisions of the Secretary of the Interior in regard to said land grants and the adjustment thereof as follows:

"A."

Decision of Secretary Lamar directed to Commissioner Sparks, dated October 6, 1887, found in 6 vol. Land Decisions, pages 190–194.

"B."

Decision of Secretary Lamar to Commissioner Sparks, dated October 7, 1887, 6 Land Decisions, pages 196–209.

"C."

Decision of Secretary Lamar in regard to the Bayfield
33 branch, dated October 7, 1887, 6 Land Decisions, pages 210–217.

"D."

Decision of the Secretary of the Interior on the appeal of the Wisconsin Central Railroad Company, dated January 24, 1890, 10 Land Decisions, pages 63–67.

"E."

Decision of the Secretary of the Interior on the final adjustment of the grant of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, dated February 11, 1890, 10 Land Decisions, pages 147–150.

The aforesaid decisions of the Secretary of the Interior are hereby made a part of this bill for purposes of reference in like manner as the statutes of the State of Wisconsin and for the establishment of matters of fact therein stated and referred to.

(29.) The plaintiff then gave in evidence a certain agreement executed between the Wisconsin Central Railroad Company and the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, dated February 12, 1884, which is in the words and figures following, to wit:

Memorandum made this 12th day of February, 1884, between the Wisconsin Central Railroad Company, hereinafter termed "the Central Company," and J. A. Stewart and Edwin H. Abbot, "trustees" in possession of the Wisconsin Central railroad, hereinafter termed "the trustees," parties of the first part, and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, hereinafter termed "the Omaha Company," party of the second part, of adjustment of controversy existing between the said two companies as to lands in the overlap of the grants made by the acts of June 3, 1856, and May 5, 1864, to the State of Wisconsin to aid in the con-
34 struction of the railways of the two companies.

SECTION I. It is agreed that the Central Company shall have:

1st. All the railroad lands in township 47, range 5, situate within the six-mile limits of the grant of the Omaha Company.

2d. All that part of the four-mile strip outside of the six-mile of Omaha, and within the ten-mile limit of the Central Company's grant, and within townships 45, 46 and 47, ranges 4 and 5 west.

3d. Also the undivided one-half of the lands of the Omaha grant, between the six and fifteen mile limits under the act of June 3, 1856, where the same is overlapped by the Wisconsin Central indemnity limit in township 43, ranges 4 and 5 west; township 44, ranges 4, 5 and 6, and township 45, ranges 4 and 5 west.

4th. The undivided half of that part of the Omaha indemnity lands lying between the fifteen-mile limit of the grant of 1856 and the twenty-mile limit of the grant of 1864, which is overlapped by

the indemnity limits of the Wisconsin Central grant, and embraced in township 42, ranges 4 and 5, township 43, ranges 4 and 5, and township 44, range 4.

SECTION II. The Omaha Company is to apply for, and take from the State to it, patents to the lands embraced in the foregoing subdivisions 1, 2 and 3, and it is to take patents from the State for the undivided half of the lands described in the foregoing subdivision 4.

SECTION III. The Central Company is to apply for and take patents, as for its account, from the State to Henry F. Spencer, to the undivided one-half of the land described in the subdivision 4 of section I.

SECTION IV. The Omaha Company will, upon receiving
35 from the State patents to lands described in the foregoing subdivisions 1 and 2, execute and deliver to Henry F. Spencer a deed conveying the said land by quitclaim to said Spencer, except so much thereof as shall have been contracted to be sold by the Omaha Company. And as to lands so contracted to be sold by the Omaha Company, the said company shall carry out said contracts and account to said Spencer for the proceeds of the sales under the said contracts.

SECTION V. The Omaha Company is to hold title to the lands described in the subdivision 3, and is to manage and sell the same, with the concurrence of the Central Company or the said trustees, and is to account to the Central Company or to said trustees for one-half of the net proceeds of the sales of said lands. Provided, that all contracts heretofore made by the Omaha Company for the sale of any of the lands embraced in the said subdivision 3 are to be carried out by the said company, and it is to account as to said lands to the Central Company or to said trustees for one-half of the proceeds under said contracts.

SECTION VI. As to the lands described in subdivision 4, the title to which is to be in the Omaha Company and said Henry F. Spencer, they shall be managed and sold by the Omaha Company, with the concurrence of said Spencer, or his agent; and the Omaha Company shall account to said Spencer for one-half of the net proceeds thereof, and one-half of all the net income derived therefrom.

SECTION VII. The Central Company and said Stewart and Abbot, trustees, are to withdraw all objection to the patenting by the State of Wisconsin or the United States, or both, to the Omaha Company, its successors and assigns, of any or all lands within
36 the overlap of said grants in Wisconsin, except such lands as lie east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly ten-mile limit of the Central Company; and the said Central Company and the said trustees are to execute and deliver to the Omaha Company such instruments of consent to the patenting of said lands to the Omaha Company as shall from time to time be requested by said Omaha Company.

SECTION VIII. The Central Company is to have the trespass money in the State treasury, so far as the same can be traced, col-

lected from the lands described in subdivisions 1 and 2, and one-half of the said trespass money in the State treasury, so far as the same can be ascertained, collected from the lands in subdivisions 3 and 4, less a proper proportion for expense of collecting by the State.

SECTION IX. The Central Company is to cause its solicitor or solicitors in the case of The Madison & Portage Railway Company against The North Wisconsin Railway Company and others, commenced in the circuit court of the United States for the western district of Wisconsin, now pending on appeal in the Supreme Court of the United States, to file such stipulation in the latter court for the dismissal of its appeal in said cause, without cost or expense howsoever to it, as shall be necessary to procure the dismissal of said appeal; and likewise to file such stipulations in said cause in the circuit court, after the said appeal shall have been dismissed, as shall be necessary to the execution of said decree, and settlement of the accounts of the receiver therein and the like, without cost to the Wisconsin Central.

37 SECTION X. It is understood and agreed that on the conveyance by the Omaha Company of the said lands hereinabove described, or any thereof, it shall reserve to itself, its successors and assigns a right of way one hundred feet in width for its railway over the same; and it is understood also that the right of way for the Ashland Railway Company, as now located and constructed, over any of the lands above described, shall be conveyed to the Ashland Railway Company free of cost.

SECTION XI. It is expressly understood and agreed that in conveying the lands described in subdivision 3, the Omaha will execute deeds when required, with covenants of warranty, upon being satisfactorily indemnified, by the Central Company from one-half the lessor costs, if any, at any time to arise or grow out of a breach of said warranty.

SECTION XII. The Omaha Company consents that the Central Company shall take patents for all the lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly ten-mile limit of the Central Company, and agrees to assist the Central Company to get such patents from the State of Wisconsin.

In witness whereof the said Omaha Company has caused this memorandum to be signed on its behalf by Marvin Hughitt, its president, and the said Central Company has caused it to be signed on its behalf by Edwin H. Abbot, its vice-president, and said trustees, J. A. Stewart and Edwin H. Abbot, have hereunto

38 set their hands the day and year hereinbefore first written.

NOTE.—This memorandum is executed in triplicate.

WISCONSIN CENTRAL R. R. CO.,
By EDWIN H. ABBOT, *Vice-President.*
JOHN A. STEWART, } *Trustees,*
EDWIN H. ABBOT, }
By EDWIN H. ABBOT, *Trustee in Charge.*
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO.,
By MARVIN HUGHITT, *President.*

(30.) The plaintiff then read in evidence the depositions of J. F. Van Dooser and Louis Oettel as follows:

J. F. VAN DOOSER testified as follows:

I reside at Ashland, Wisconsin, and have lived there between four and five years; am a real-estate dealer. I know the west fractional half of section seven, town. forty-seven, range four west. The fair value of the east half of the west half of the section, take it right through, is about seventy-five dollars an acre, I should say; that would probable be a rather low estimate; that includes the east half of the northwest quarter and the east half of the southwest quarter. The north quarter is a good deal more valuable than the south quarter. The two eighties, being the east half of the southwest quarter and the east half of the northwest quarter, are worth a hundred dollars an acre. The northwest quarter and the west half of the southwest quarter, taking them together, would, perhaps, be worth twenty-five dollars an acre less than the other; they are that much further away from town. I should say seventy-five dollars
39 an acre. These are timber lands, pine and birch, mostly pine. There is in the low portions of it a good deal of birch. It is in the city limits of Ashland, in what is now the city limits. The whole half section is in the city limits. There is a railroad which crosses it. The Northern Pacific cuts a little corner of- the northwest quarter.

Cross-examined by Mr. GREENE, defendant's attorney:

Its value is mainly due to its proximity to the city of Ashland. The pine on it is not of any great value. Most of the pine has been cut off. It is valuable for other purposes. I sold twenty acres out of the further quarter for one hundred and fifty dollars an acre, cash, for brick-yard purposes. There is a brick yard on there now. There is no pine on it to amount to much; all the large pine has been cut off. It was cut a year ago last winter, the majority of it. There had been some cut before, but it was cut over the second time and all cut a year ago last fall. As to whether there was originally pine on it, I was not familiar with it before four years ago, and I do not know how much had been cut off before that; had seen it before only in passing over it, and noticed large stumps where other trees had been removed before.

Redirect examination by Mr. PINNEY, plaintiff's attorney:

There are three hundred and twenty acres in this section—I understand there is about 320 acres.

J. F. VAN DOOSER.

Taken, subscribed, and sworn to before me this 16th day of June, 1891.

OLAF I. ROVE,
Notary Public, Dane Co., Wisc.

40 LOUIS OETTEL testified as follows:

I reside at Ashland and have lived there about nine years. My occupation is farming; am acquainted with the value of lands around that country to some extent. I know the land described by Mr. Van Dooser—the west half of section seven, town. forty-seven, range four west. In my judgment the value per acre of the east half of the northwest quarter and the east half of the southwest quarter, take it right through, is about a hundred dollars—rather more than a hundred. The value of the west half of the northwest quarter and the west half of the southwest quarter is about from eighty to eighty-five dollars per acre. I understand it lies in the city limits.

Cross-examined by Mr. GREENE, defendant's attorney:

I knew that land more than four years ago. Originally it had pine on it. I run it over once, about three years ago, before Ed. Brown cut it for the Superior Lumber Company. There was pine over it on each forty. The right of way was all cleared—the right of way of the Northern Pacific. I did not estimate the pine on it. I run it over for some cord wood, to see how much cord wood could be cut off from it.

LOUIS OETTEL.

Taken, subscribed, and sworn to before me this 16th day of June, 1891.

OLAF I. ROVE,
Notary Public, Dane Co., Wis.

(31.) Plaintiff gave in evidence a duly certified transcript from the tract book of the Ashland land office, showing the entries on the tract book in that office in regard to section seven, town.
41 forty-seven, range four, and particularly in respect to the west half thereof. So much thereof as relates to the lands in question reads as follows:

Township No. 47 N., Range No. 4 W., District of Ashland, Wis.

Description of tract.				Contents		Rate per acre.	Purchase-money.	Name of the purchaser.	Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded.	
Part of section.	Section.	Township.	Range.	Acres.	Parts.	Dollars.	Cents.	Dollars.	Cents.					Volume.	Page.
W. ½	7	47	4	319	26	.....	.....	.....	.....	C., St. P., M. & O. R'y.	July 12, 1887.	No. 1	Can. Jan'y 8, '91			

42 And thereupon the plaintiff rested his case, and the defendant gave in evidence—

(1.) Chapter 314 of the Private and Local Laws of Wisconsin for 1866, page 730, entitled "An act to incorporate the Winnebago and Lake Superior Railroad Company and to execute the trust created by section 3 of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 6, 1864," approved April 6, 1866.

(2.) Chapter 362 of the Private and Local Laws of Wisconsin for 1866, page 869, entitled "An act to incorporate the Portage and — Superior Railroad Company and to execute the trust created by an act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864," approved April 9, 1866.

(3.) A map or diagram, duly certified by the register of the land office at Ashland, showing the relative granted and indemnity limits of the land grants of the Chicago, St. Paul, Minneapolis & Omaha Railway Company and of the Wisconsin Central Railroad Company coterminous with and opposite the lands in controversy, from which it appears that the lands in question are within the additional four miles granted limits of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, under the first section of the act of Congress of May 5, 1864, and the ten miles granted limits of the Wisconsin Central Railroad Company, under the third section of the same act. Said map or diagram is marked for identification "Spencer *v.* McDougal, June 26, 1891, R. Bunn, district judge," and is to be produced at the hearing as a part of the record.

(4.) The decision of the Secretary of the Interior adjusting the land grant of the Chicago, St. Paul, Minneapolis & Omaha Railway Company in 11 Land Decisions, pages 607–614, to which reference is made as a part of this bill.

(5.) A duly certified copy by the register of the land office at Ashland of the declaratory statement of David J. Cooper, in the words and figures following, to wit:

43 "I, David J. Cooper, of the county of La Pointe and State of Wisconsin, being a citizen of the United States and a single man, have, on and since the third day of May, 1858, settled and improved the northwest quarter of section seven, in town. forty-seven, range four west, and I do hereby claim the said tract of land as a pre-emption right under the provisions of the act of Congress of September 4, A. D. 1841.

Given under my hand this third day of May, 1858.

his
DAVID x J. COOPER."
mark.

In presence of—
A. B. WHEELOCK.
JOS. McCLOUD.

UNITED STATES LAND OFFICE, *Ashland, Wisconsin,* } ss:

I, G. W. Carrington, register of the United States land office at Ashland, Wisconsin, do hereby certify that the annexed copy of pre-emption declaratory statement No. 473 of David J. Cooper has been carefully compared with the original pre-emption declaratory statement No. 473 of David J. Cooper; that the annexed copy is a true and correct copy of said pre-emption declaratory statement No. 473 of David J. Cooper and of the whole thereof, and that said pre-emption declaratory statement No. 473 of David J. Cooper is on file in this office.

Dated June 20, 1891. G. W. CARRINGTON,
Register U. S. Land Office, Ashland, Wisconsin.

The plaintiff objected to said evidence as incompetent and for the reason that said declaration is void on its face and insufficient, and for the further reason that at the time it was made the lands in question were withdrawn from sale and pre-emption, and also on the ground of immateriality.

The court overruled said objection and admitted said statement in evidence; to which ruling the said plaintiff, by his counsel, then and there excepted.

(6.) The defendant offered in evidence a certified statement from the Ashland land office, certified by the register thereof to be a true and correct transcript from the official abstract, of declaratory statements filed in the land office at Hudson, Wisconsin, on lands alleged in said certificate to have been unoffered. Said statement is as follows:

44 *Abstract of Declaratory Statements Filed in the Land Office at Hudson, Wisconsin, During the Month of May*, 1858, *on Lands which are Unoffered.*

No. of statement filed.	Date of settlement.	Date when filed.	Name.	Description.	Section.	Township. N.	Range. W.	Acres.	Remarks.
461	May 3, 1858	May 3, 1858	Bemsley G. Sweet	N. W. ¼	19	51	3	160.29	P. E. 1841.
462	" "	" "	George W. Turner	S. E. ¼	13	51	4	160	" "
463	" "	" "	Alvin Turner	N. E. ¼	24	51	4	160	" "
464	" "	" "	Andrew Tate	S. W. ¼	17	51	3	160	" "
465	" "	" "	Patrick Collins	S. E. ¼	24	51	4	160	" "
466	" "	" "	Edward Tooley	S. E. ¼	29	48	14	160	" "
467	" "	" "	Thomas L. Patterson	Fl N. W. ¼	23	51	3	47.42	" "
468	" "	" "	Jerome B. Frasier	N. W. ¼	29	48	14	160	" "
469	" "	" "	Edward J. Butler	S. E. ¼ N.W. ¼	2	48	14	40	" "
470	" "	" "	Joseph Collier	S. E. ¼	8	48	14	160	" " C. Perry.
471	" "	" "	William D. Halbert	S. W. ¼	20	48	14	160	P. E. 1841.
472	" "	" "	Joseph McCloud	E. ½ S. E. ¼ & lot 5.	19, 20	51	3	140.72	" "
473	" "	" "	David J. Cooper	N. W. ¼	7	47	4	158.81	" "
473½	" 10th, "	" 10th, "	John E. Turner	S. E. ¼	18	51	3	160	" "
474	" " "	" " "	John Holland	N. W. ¼	17	51	3	160	" "
475	3rd, "	" "	Francis B. Moreau	N. E. ¼	12	48	5	160	" "
476	3rd, "	" "	Thomas Brunette	N. E. ¼	13	48	5	160	" "
477	"	" "	Joseph Gaudin	Lot 4, sec. 9, S.E. ¼ S. E. ¼	8	49	4	139.84	" "
478	3	" 11	John Sterner	S. W. ¼	32	49	4	160	" "
479	3	" "	Thomas Burke	E. ½ N. E. ¼ sec. 30 & lot 1	29	57	3	134.38	" "
480	3	11	Hercule Lord	S. W. ¼	28	49	4	160	" "
481	3	11	J. F. Shafer	N. E. ¼	19	51	3	160	" "
482	3	11	Paul Lanonette	S. W. ¼	19	51	3	160.9	" "
483	3	11	John M. Freer	N. W. ¼	24	50	5	160	" "
484	3	11	Robert McArthur	N. E. ¼	22	50	5	160	" "
485	3	11	Havier Pigon	Lots 1 & 2 & W. ½ N.W. ¼	7	48	4	159.64	
486	3	11	Roberson Pike	N. E. ¼	24	50	5	160	
487	3	11	Leonard Kitsteiner	N. E. ¼	20	49	4	160	
488	May 3, 1858	May 11th, 1858	Carls Vetter	S. E. ¼	20	49	4	160	
489	" " "	" 21 "	Asa W. Maddock	S. W. ¼	28	49	4	160	
490	12	" 21 "	Charles Shalioux	Lot No. 2	12	52	1	22.24	
491	April 24, "	" 21 "	George Kilborn	S. W. ¼	11	44	3		
492	May 11	31	William A. Caho	N. W. ¼	18	51	3		
493	11	31	John T. Caho	S. E. ¼	7	51	3	160	
494	3	31	William Berry	Fr'l S. E. ¼ & E. ½ S. W. ¼ (lots 1 & 2)	8	51	3	92.17	
495	3	31	John McDonald	N. E. ¼	18	51	3	160	

45 UNITED STATES LAND OFFICE, } ss:
Ashland District, Wisconsin, }

I, G. W. Carrington, register of the United States land office in and for said district, do hereby certify that I have compared the annexed transcript from the official abstract of declaratory statements filed in the land office at Hudson, Wisconsin, on lands which were unoffered with the original now in my custody as such register, so far as said abstract shows the declaratory statements filed during the month of May, 1858, for lands subject to entry at the U. S. land office at Hudson, Wisconsin, and that the annexed is a true and correct transcript from said abstract and of all therein that relates to said declaratory statements filed during the month of May, 1858.

Given under my hand, at Ashland, Wis., June 23, 1891.

G. W. CARRINGTON,
Register of U. S. Land Office, Ashland District, Wisconsin.

Said evidence was objected — for the reasons assigned in respect to the declaratory statement last above mentioned. The court overruled the same and admitted said transcript in evidence; to which ruling the said plaintiff, by his counsel, then and there excepted.

(7.) The defendant offered in evidence a certified copy of declaratory statement of Christiana Mautshke, certified in due form by the register of the Ashland land office as being a true copy of the declaratory statement No. 498 of said Christiana Mautshke
46 on file in his said office; said certificate is in the words and figures following:

"498. I, Christiana Mautshke, a widow, have, on the 16th day of June, one thousand eight hundred and fifty-eight, settled and improved the southwest quarter of section seven, town. forty-seven, range four west, in the district of lands subject to sale at the land office at Superior, and containing one hundred and sixty acres, which land has not been offered at public sale and thus been rendered subject to private entry; and I do hereby declare my intention to claim said tract of land as a pre-emption right under the provisions of said act of the fourth of September, one thousand eight hundred and forty-one.

Given under my hand this 16th day of June, one thousand eight hundred and fifty-eight.

her
CHRISTIANA x MAUTSHKE.
mark.

In presence of—
BERNARD HOPPENYAN,
WILLIAM METTE.

UNITED STATES LAND OFFICE, } ss:
Ashland, Wisconsin, }

I, G. W. Carrington, register of the United States land office at Ashland, Wisconsin, do hereby certify that the annexed copy of

pre-emption declaratory statement No. 498 of Christiana Mautshke has been carefully compared with the original pre-emption declaratory statement No. 498 of Christiana Mautshke; that the annexed copy is a true and correct copy of said pre-emption declaratory statement No. 498 of Christiana Mautshke and of the whole thereof, and that said pre-emption declaratory statement No. 498 of Chris; tiana Mautshke is on file in this office.

Dated June 20, 1891.

G. W. CARRINGTON,
Register U. S. Land Office, Ashland, Wisconsin.

The plaintiff's counsel objected to the reception of said declaratory statement on the ground that the same was incompetent and for that it was void on its face and insufficient as a pre-emption statement, and for the further reason that at the time it was made the lands were withdrawn from sale and pre-emption, and also on the ground of immateriality.

The said court overruled said objection and received the same in evidence; to which ruling counsel for plaintiff then and there excepted.

(8.) Counsel for defendant offered in evidence a certified transcript of the abstract of declaratory statements filed in the land office at Hudson, Wisconsin, for the month of June, 1858, duly certified to by the register; which said abstract is as follows:

47 *Abstract of Declaratory Statements Filed in the Land Office at Hudson, Wisconsin, During the Month of June, 1858, on Lands which are Unoffered.*

No. of statement filed.	Date of settlement.	Date when filed.	Name.	Description.	Section.	Township.	Range.	Acres.
496	May 3	June 11	Joseph Wolf	S. W. ¼	32	49	4	160
497	Apr. 30	" 23	Rhod. Caddotte	S. E. ¼	1	47	5	160
498	June 16	" 23	Christiana Mautshke	S. W. ¼	7	47	4	159.45
499	" 16	" 23	Augustin Bisson	N. ½ S. W. ¼, N. ½ S. E. ¼	5	46	4	134.25
500	May 21	" 23	Augustus Eckle	N. E. ¼	17	44	3	
501	" 17	" 23	Henry Kamp	S. ½ of S. E. ¼, sec. 10, & N. ½ of N. E. ¼,	15	44	3	
502	" 27	" 23	Eugene F. Pierce	S. E. ¼ of N. W. ¼ & N. E. ¼ of S. W. ¼ & W. ½ of S. W. ¼.	17	44	3	

UNITED STATES LAND OFFICE,
ASHLAND, WISCONSIN, *June* 3, 1891.

I hereby certify that the above copy of abstract of declaratory statements filed in the land office at Hudson, Wisconsin, during the month of June, 1858, on lands which are unoffered, is a true and correct copy of that part of the abstract of pre-emption declarations filed at the land office at Hudson, Wisconsin, on unoffered lands, now on file in the United States land office at Hudson, Wisconsin, showing the pre-emption declaratory statements filed in the United States land office at Hudson, Wisconsin, during the month of June, 1858.

G. W. CARRINGTON, *Register.*

48 Counsel for the plaintiff objected to said abstract for the reasons last above stated; but the court overruled said objection and received the same in evidence; to which said ruling and decision counsel for plaintiff then and there excepted.

(9.) Counsel for defendant offered in evidence a certified copy of the order of the Commissioner of the General Land Office, dated January 8, 1891, directing the opening or advertisement of the lands here in question for entry, together with a large number of other tracts; which said order is in the words and figures following, so far as it relates to the lands in controversy in this cause:

49 "F." DEPARTMENT OF THE INTERIOR, W. C. E.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 8, 1891.

Register and receiver, Ashland, Wisconsin.

SIRS: Under date of February 12, 1890, the Hon. Secretary of the Interior approved the adjustment of the grant made by the acts of June 3, 1856, and May 5, 1864, for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and directed the restoration of all lands not needed in satisfaction of the grant.

Before any action had been taken thereunder the order of approval was withdrawn, and is again returned with departmental letter of December 19, 1890, containing additional instructions in the matter of the restoration of the lands.

With the lands heretofore approved and a list but recently submitted for the approval of the Hon. Secretary of the Interior the grant is satisfied, barr*ied* a few isolated tracts within the primary limits of the grant and free from conflict with the grant for the Wisconsin Central Railway Company, which tracts will not be affected by this order of restoration. Under the directions of the department, and in order to carry the restoration into effect, you will at once cause to be published for 90 days in some newspaper of general circulation in your district a notice that all lands heretofore withdrawn on account of the grant for the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and not needed in satisfaction of said grant, are restored; that all parties claiming any of these lands as purchasers under the 5th section of the act of

50 March 3, 1887, must come forward during the period of ninety days, submit proof, and make payment, in pursuance of the requirements of the official circular of February 13, 1889, and that a failure to submit proof and make payment within that time will be treated as a waiver of claim.

Where parties have heretofore make purchase of any of these lands under the act of March 3, 1887, they will be required to give a new notice under the circular within the prescribed period, and if, at the proper time, no adverse claimant appears, then the proof heretofore submitted, if otherwise correct, may be accepted.

Notice should also be given to those persons who have applications pending for any of these lands that such applications conferred upon them no right to the lands applied for, the same having been presented while the lands were in a state of reservation; that all

such applications have been rejected, and that at the expiration of the aforesaid period of publication all lands not claimed by purchasers will be subject to entry under the settlement laws by the first legal applicant without regard to such applications.

To the end that all such applicants may have an opportunity to present new applications upon the expiration of the period of publication, you will notify all parties shown by your records to have pendind applications for these lands at once of the rejection of their applications and of the restoration after a period of 90 days' publication.

For public convenience I have had prepared a list of the lands in your district affected by the order of restoration, which is herewith enclosed, and in the notice of restoration you will include said list.

On account of the haste in its preparation, that the lands
51 might be restored at the earliest possible day, there may be mistakes in the list, but the same is for information only, and in no case of mistake will the same affect rights heretofore acquired or hereafter to be acquired to any of the lands.

A copy of the newspaper containing the notice should be promptly forwarded for the information of this office.

The receiver, as disbursing officer, will pay the cost of publication and should forward a copy of the notice, with proof of publication, as his voucher for the disbursement.

Selections pending unapproved for any of the lands included in the list are hereby canceled.

Very respectfully,

(Signed) LEWIS A. GROFF,
Commissioner.

Ashland district.

West half section seven, town. forty-seven, range four west.

(*Certificate.*)

I, G. W. Carrington, of the United States land office at Ashland, Wisconsin, do hereby certify that I have compared the annexed copy of letter "F" of the Hon. Commissioner of the General Land Office, dated January 8, 1891, restoring lands under adjustment of C., St. P., M. & O. Railway Co.'s grant, and the accompanying list of restored lands with the original letter and accompanying list now on file in my office, and that the same is a true and correct copy thereof and of the whole thereof.

Witness my hand this 20th day of June, 1891.

G. W. CARRINGTON, *Register.*

52 The said order was objected to by counsel for the plaintiff as irrelevant, incompetent, and immaterial. The court overruled said objections and received the same in evidence; to which ruling and decision the plaintiff's counsel then and there excepted.

(10.) Defendant's counsel offered in evidence chapter 257 of the Private and Local Laws of 1869, page 578, approved March 10, 1869, entitled "An act to authorize the Portage and Lake Superior Rail-

road Company to consolidate with the Winnebago and Lake Superior Railroad Company under the name of the Portage, Winnebago and Superior Railroad Company."

(11.) Defendant's counsel offered in evidence chapter 27 of the Laws of Wisconsin of 1871, page 42, approved February 4, 1871, entitled "An act to change the name of the Portage, Winnebago and Superior Railroad Company."

(12.) Order of withdrawal of lands in favor of the Wisconsin Central Railroad Company, dated December 10, 1869, found in vol. 10 of Land Decisions, 147–150, in the adjustment of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, to which reference is hereby made as a part of this bill.

E. E. BROSSARD, being duly sworn as a witness on behalf of the defendant, testified as follows:

I live at Ashland, Ashland county, Wisconsin, and am an attorney-at-law, and have practiced some of late in the land office there; have had some experience in examining the records of the land office; examined the records at Ashland, in the land office, to see whether the land here in question—west half section seven, forty-seven, four west—was ever offered for sale. I found there was no record of the lands ever having been offered at public sale,
53 or I might say that I failed to find any evidence that they ever had been. I examined the records with reference to the pre-emption entries, evidence of which has been introduced. There is no record in the land office at Ashland that these declarations were ever cancelled.

On cross-examination the witness testified:

I was admitted to the bar a year ago last January; have been engaged around the land office at Ashland about a year ago last month. I cannot say that I did apply to the officers of the land office in regard to the matters aforesaid except so far as having them show me their records. I talked with the register about it. I never applied to him directly for information on this subject. I never put the question to him in regard to the matters aforesaid.

Question. Do you know of your own knowledge whether the lands had or had not been offered for sale?

Answer. Yes, sir; so far as the records show at the land office.

Question. Do you know, as a matter of fact, anything about it?

Answer. Not outside of the records of the land office I do not.

Question. If the record don't show anything you don't know anything outside of it?

Answer. The records do not show whether they have been offered. I presume that the records are kept. I am one of the attorneys in this case.

Thereupon the defendant rested his case.

The foregoing is the substance of all the evidence given on the trial of the action.

After argument by counsel for the plaintiff and defendant the

court instructed the jury to find a verdict for the defendant;
54 to which said ruling and instruction the plaintiff's counsel then and there excepted; and the said jury under the said instruction returned a verdict, as stated in the record in this cause, in favor of the defendant and finding that the value of the premises in controversy is sixteen thousand dollars. Judgment upon the merits was rendered in favor of the said defendant and against the plaintiff, with costs, as stated in the record in this action.

And because the matters so produced and given in evidence on the trial of said action and the said several rulings of the said court in relation thereto and said several exceptions so taken by said plaintiff thereto do not appear upon the record of the trial of said action the said court at the term aforesaid has allowed, signed, sealed, and settled the foregoing bill of exceptions according to the statute in such case made and provided and the rules and practice of said court this twenty-seventh day of June, A. D. 1891.

R. BUNN,
District Judge.

55 The United States of America to Alexander McDougal, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the twenty-seventh day of July next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein Henry F. Spencer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

R. BUNN,
Dist. Judge.

56 [Endorsed:] Supreme Court of the United States. Henry F. Spencer, plaintiff in error, *vs.* Alexander McDougal, defendant in error. Citation. Due service of within citation admitted June 30th, A. D. 1891. George G. Greene, attorney for def't, McDougal.

57 WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom, and also a true copy of the security on the writ of error and of the

endorsements thereon and the original citation and service thereof under said writ.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Madison, this 29th day of June, 1891.

F. M. STEWART, *Clerk.*

For assignment of errors see next page.

58 Supreme Court of the United States.

HENRY F. SPENCER, Plaintiff in Error,
vs.
ALEXANDER MCDOUGAL, Defendant in Error.

And afterwards, to wit, on the 27th day of July, A. D. 1891, comes the said Henry E. Spencer, before, &c., by S. U. Pinney, his attorney, & says that in the record & proceedings aforesaid there is manifest error, in this, to wit:

I. The said circuit court erred in admitting in evidence against the plaintiff's objections the declaratory statement of David I. Cooper, dated May 3, A. D. 1858.

II. The said circuit court erred in admitting in evidence against plaintiff's objections the declaratory statement of Christiana Mautschke, dated June 16, 1858.

III. The said circuit court erred in admitting in evidence against the plaintiff's objections the so-called certified lists of declaratory — for May & June, A. D. 1858, alleged to have been filed at the Hudson land office in said months.

IV. The said circuit court erred in admitting in evidence the order of Lewis A. Groff, Commissioner of the General Land Office, dated Jan. 8, 1891, against the plaintiff's objections.

V. The said circuit court erred in directing the jury to find a verdict for the defendant.

And the said Henry F. Spencer prays that the judgment aforesaid may be reversed, annulled, & altogether held for naught, & that he may be restored to all things which he hath lost by occasion of the said judgment.

S. U. PINNEY,
Attorney for Pl'ff in Error.

Endorsed on cover: Case No. 14,767. W. Wisconsin C. C. U. S. No. 1293. Henry F. Spencer, plaintiff in error, *vs.* Alexander McDougal. Filed July 23, 1891.

#245 C.f.
[redacted] 159-62

Office Supreme Court, U. S.
FILED.
APR 4 1895
JAMES H. McKENNEY,
CLERK.

THE ST. CROIX LAND GRANT.

OPINION OF THE U. S. DISTRICT COURT.

Circuit Court of the United States, Western District of Wisconsin.

The Madison & Portage Railroad Company, *Complainant*,

vs.

Treasurer of the State of Wisconsin, The West Wisconsin Railway Company, The Wisconsin Railroad Farm-Mortgage Land Company, The North Wisconsin Railway Company, The Chicago, Portage & Superior Railway Company, and the Wisconsin Central Railway Company, *Defendants*.

Upon Original and Cross-Bills.

Mr. Justice HARLAN delivered the following opinion:

By the first section of the act of Congress, approved June 3, 1856, granting public lands to aid in the construction of railroads in the State of Wisconsin, there was granted to that State "for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix River or lake, be-

tween townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield, and also from Fond du Lac on Lake Winnebago northerly to the State line, every alternate section of land, designated by odd numbers, for *six* sections in width, on each side of said roads respectively." "But," the act declares, "in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections or parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purpose aforesaid; *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case and selected for and on account of said roads; *Provided further*, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; *And provided further*, That any and all lands reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or in any

manner for any purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroads through said reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The second section provides that the sections and parts of sections of land, which, by such grant, remained to the United States, within six miles on each side of said roads, should not be sold for less than double the minimum price of the public lands when sold; nor should they become subject to private entry until the same had been offered at public sale at the increased price.

By the fourth section it is declared that the lands granted should not be disposed of by the State except in the following manner: That a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads respectively, might be sold; and when the governor of the State should certify to the secretary of the interior that any twenty consecutive miles of either of said roads were completed, "then another like quantity of land" thereby granted might be sold, and so from time to time, until the roads are completed.

If the roads were not completed within ten years, the act provided that no further sales should be made, and the unsold lands should revert to the United States.

The lands, rights, and privileges thus granted were on the eighth of October, 1856, formally accepted by the State upon the terms, conditions, and restrictions contained in the act of Congress, and the State assumed and undertook the trust thereby created.

On the eleventh of October, 1856, the State, by an act on that day approved, authorized the La Crosse & Mil-

waukee Railroad Company—a corporation created by the laws of Wisconsin—to construct and operate the roads described in the act of Congress, from Madison and Columbus via Portage City to St. Croix River and lake, and from thence to the west end of Lake Superior and to Bayfield; and, for the purpose of aiding such construction, the State granted to that company all its interest and estate, present and prospective, in or to the lands granted by the act of June 3, 1856, for the construction of the railroad between the points and along the routes just named, together with all the rights, privileges, and immunities conferred, or intended to be conferred, by the act of Congress.

Prior to May 5, 1864, no portion of the entire route from Madison, via Portage City and St. Croix River or lake, to the west end of Lake Superior and to Bayfield, had been completed, except the line between Portage and Tomah, a distance of sixty-one miles. That part of the line was constructed in the years 1857 and 1858, and ever since April, 1858, has been in use for freight and passenger trains.

On May 5, 1864, Congress passed an act "granting lands to aid in the construction of certain railroads in the State of Wisconsin." Since the rights of parties to this litigation depend chiefly, if not altogether, upon the construction and effect which may be given to that act, it is necessary to refer, at some length, to its provisions.

By the first section it is declared "that there be and is hereby granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad *from a point on the St. Croix River or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said road, to be selected by said State, to Bayfield*, every alternate section of public land designated

by odd numbers, for *ten* sections in width on each side of said road, *deducting* any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June 3, 1856." "But," the act provides, "in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the secretary of the interior, from the public lands of the United States, nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid), shall be held by said State for the use and purpose aforesaid; *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June 3, 1856, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June 3, 1856."

By the second section of the act a grant, in similar terms and upon like conditions as to the selection of lands

in lieu of sections or parts of sections appearing, when the line or route of the road shall have been definitely fixed, to have been sold, reserved, or otherwise disposed of, was made to the State for the purpose of aiding in the construction of *a* railroad *from Tomah to the St. Croix River or lake, between sections twenty-five and thirty-one*, of "every alternate section of public land, designated by odd numbers, for *ten* sections in width on each side of said roads, *deducting* any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress granting lands to said State to aid in the construction of certain railroads, approved June 3, 1856, upon the same terms and conditions as are contained in the said act of June 3, 1856."

By the third section of the act, and upon like conditions as to the selection of lieu lands, (except that no reference was made to deductions of lands granted by or received under the act of June 3, 1856,) there was granted to the State, to aid in the construction of *a* railroad *from Portage City, Berlin, Doty's Island, or Fond du Lac, as the State might determine, to Bayfield, and thence to Superior, on Lake Superior*, "every alternate section of public land, designated by odd numbers, for *ten* sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June 3, 1856."

Section four declares that the sections and parts of sections of land remaining to the United States, within ten miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor should any of the said reserved lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

By section five it is provided that the time fixed and limited for the completion of the roads, in the act of June 3, 1856, was extended to a period of five years from and after May 5, 1864.

Section six is similar to the last proviso of section one of the act of June 3, 1856.

By section seven it was declared that whenever there was "completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, *as far as the same is completed*, and *coterminous with said completed section*, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed; *Provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States.

The eighth section declares that the lands granted by that act shall, when patented as provided in the seventh section, be subject to disposal, for the purposes stated in the act and for no other, and the railroads should be and remain public highways for the use of the Government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States.

The ninth and only remaining section provides that if the road mentioned in the third section is not completed within ten years from the passage of the act, as provided therein, no further patents should be issued to the company for such lands, no further sales should be made, and the lands unsold should revert to the United States.

On the twentieth of March, 1865, the lands granted by the act of May 5, 1864, were accepted by the State, subject, however, to all the conditions of said act of Congress, and the State consented "to execute the said trust, created by the aforesaid act of Congress, pursuant, in all things, to the terms, limitations and conditions of said act." The secretary of State of Wisconsin was required to transmit a certified copy of the resolution, showing such acceptance, to the secretary of the interior.

Recurring to the provisions of the act of June 3, 1856, it seems to be reasonably clear that that act contemplated, or at any rate rendered possible, the construction, by one company, of a single continuous railroad from Madison or Columbus via Portage City and St. Croix River or lake, to the west end of Lake Superior and to Bayfield. But the continuity of such line was destroyed, and, in my opinion, was intended to be destroyed, by the act of May 5, 1864. Instead of making an additional or increased grant for one entire line, as described in the act of June 3, 1856, from Madison or Columbus to Lake Superior, Congress, in one section of the act of 1864, made a distinct grant for a railroad from a point on the St. Croix River or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior and to Bayfield; in another section, a distinct grant to aid in the construction of another railroad from Tomah to St. Croix River or lake, between townships twenty-five and thirty-one; and, in a third section, a distinct grant for another and distinct railroad

from Portage City, Berlin, Doty's Island, or Fond du Lac to Bayfield, thence to Superior. If Congress had intended to give additional lands for the benefit of the same or a single and continuous line from Madison or Columbus, via St. Croix River or lake, to the west end of Lake Superior and to Bayfield, as described in the act of June 3, 1856, that result could have been effected by an amendment of that act, simply extending, for the benefit of the line therein described, and which had then been formally located, the place limits to ten miles and the indemnity limits to twenty miles. But, instead of adopting that course, it made a specific grant, in separate sections, for distinct roads, between designated terminal points, without requiring the parties or companies constructing those several lines to adopt the line or route which may have been located under or by virtue of the act of June 3, 1856. This course was, perhaps, suggested by the fact, of which we may presume Congress had knowledge, that nearly eight years had elasped after the State's acceptance of the act of June 3, 1856, without anything whatever being done upon the line west and north of Tomah, beyond the mere location of the route from Tomah via St. Croix River or lake to Lake Superior. But whatever considerations may have influenced Congress, we are satisfied that the purpose of the act of May 5, 1864, was to break the continuity of the original line from Tomah via St. Croix River or lake to the west end of Lake Superior and to Bayfield, and devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by, or which could have been made available under, the act of 1856.

An important question arising upon the construction of the acts of 1856 and 1864 is, whether the act of 1864 provides for the disposal of the granted lands upon a princi-

ple, or by a rule, different from that prescribed in the act of 1856; and further, whether that of 1864 has not practically, and without violating any of the rights of the parties to this cause, superseded the essential portions of the act of 1856.

Touching the act of June 3, 1856, some of the counsel insist that the lands which, by that act were allowed to be selected in lieu of lands appearing to have been previously sold or otherwise appropriated by the government, or the lands earned by the construction of each twenty continuous miles, could have been located anywhere along the entire line from Madison via Portage and St. Croix River or lake to the west end of Lake Superior and to Bayfield, and that the selection of such lands was not by that act limited to the public lands, coterminous with any completed section of twenty miles and within fifteen miles of the line of road. Without stopping now to inquire how far that construction of the act of June 3, 1856, is maintained by some of the adjudged cases, or by the action of any department of the government, it is quite certain that the act of May 5, 1864, admits of the disposal of the lands therein granted only upon the coterminous principle. Upon the completion of twenty consecutive miles in the manner required for a first-class railroad, and upon the fact of such completion being certified by the governor, and sustained by affidavit presented to the secretary of the interior, patents could issue for the lands earned in the construction of such twenty continuous miles. But the statute, in language too explicit to admit of doubt, or to require construction, declares that the patents shall convey the right and title to such earned lands, to the companies entitled thereto, "on each side of the road *as far as the same is completed, and coterminous with said completed section*, not exceeding the amount"

prescribed in the act. According to the act of 1864, patents for lands earned in pursuance of its provisions could issue only to the companies constructing the roads described in the act, or to the companies to whom the benefit of the grant might be transferred.

It is, however, contended with much earnestness that the act of 1864, so far from repealing or modifying the act of 1856, recognizes and requires the enforcement of its provisions as to all lands covered by the grant therein contained. But, in my opinion, this position is unauthorized by anything contained in the act of May 5, 1864, and is inconsistent with the evident intention of Congress in making distinct grants for the several roads designated in that act. The grant is of " every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June 3, 1856." It certainly was not the intention of Congress, by the act of May 5, 1864, to grant to the State every alternate odd section " for ten sections in width on each side of said road," *in addition* to the alternate odd sections " for six sections in width on each side" of the roads, granted by the act of June 3, 1856. The purpose of the act of May 5, 1864, was, as to the several roads therein described, to grant the alternate odd sections for ten sections in width, in place of odd alternate sections for six sections in width, granted by the act of June 3, 1856 ; and instead of indemnity limits for fifteen miles, as provided in the last named act, to allow selections of lands within twenty miles of the located line. If

within the place limits, as established and rendered certain under the act of 1864, either by the location of a new route or by the partial adoption of the route located under the act of 1856, there should be found lands within the place limits, as established under the act of 1856, the title to which had not been earned or become vested, it was intended that such lines be taken as a *part of* the place limits under the act of 1864, and not *in addition* to the alternate sections for ten sections in width, granted by the act of 1864. That is manifestly what was meant by the requirement that the lands granted by the act of 1856 should be *deducted* from the alternate odd sections for ten sections in width granted by the act of 1864. This construction is fortified by the first proviso of section one of the act of 1864, which declares that the lands to be located in lieu of lands which had been sold or appropriated by the government, and which, therefore, could not be used to aid in constructing the railroad, should not be made "in lieu of lands *received* under the grant of June 3, 1856," but that such location might be made to supply any "*deficiency*" under the grant of June 3, 1856. That is to say, lands granted by the act of 1856, if found, upon the definite location of the respective roads under the act of 1864, to be within the place limits defined by the latter act, were not to be regarded as having been previously appropriated by Congress, so as to entitle the company constructing the road, under the act of 1864, to claim other lands in lieu thereof, but they were taken as *a part of* the "ten sections in width" granted by the act of 1864. It was, therefore, to be *deducted* from the affirmative grant of ten sections in width made in 1864. The word "deducting" was not, perhaps, the very best one to express the intention of Congress, but that Congress intended what I have indicated is reasonably clear.

If we are correct in our construction of the act of May 5, 1864, it follows that the land *coterminous with each completed section of twenty consecutive miles* of the respective roads described in and granted by *that act* were exclusively for the benefit of the respective companies who should, under the provisions of that act, construct each completed section of twenty miles, and that no one of the companies constructing a road *under that act* could, for any deficiency of lands coterminous with its own line, supply such deficiency out of lands coterminous with other lines constructed by other companies under the same act. In other words, Congress intended that all the lands granted by and earned under the act of May 5, 1864, by means of constructed road, should be disposed of according to the coterminous principle.

It results, also, from what has been said, that its acceptance of the grant of May 5, 1864, subject to all the conditions prescribed in the act of Congress, and its agreement to execute the trust therein created by Congress, "pursuant in all things to the terms, limitations and conditions in said act," binds the State to an administration of the grant upon the coterminous theory, unless rights had previously accrued under and by virtue of the act of June 3, 1856, which Congress could not, even with the consent of the State, ignore or violate, or, unless subsequent to the passage and acceptance of the act of 1864, the State, with the consent of Congress or in harmony with its legislation, recognized, in some binding form, the rights growing out of the act of June 3, 1856. Whether any of the parties to this litigation have any such rights, or whether any of them can object to the administration of the grant upon the principles enumerated in the act of May 5, 1864, we now proceed to inquire.

Before considering the exact status at the time of the

passage of the act of May 5, 1864, of the several parties to this litigation, it is necessary to state somewhat in detail all that had been accomplished between the date of the passage of the act of June 3, 1856, and prior to the passage of the act of May 5, 1864.

We have already referred to the act of Oct. 11, 1856, whereby the State conferred the grant of June 3, 1856, upon the La Crosse & Milwaukee Railroad Company. From the act of Oct. 11, 1856, it appears—

That the title to the lands granted by the act of June 3, 1856, was not to vest or be subject to disposal except upon the completion of each section of twenty consecutive miles, and that the company was prohibited from making sales exceeding six sections of land for every mile of road completed;

That the La Crosse & Milwaukee Railroad Company agreed to complete the entire road from Madison and from Columbus *via* Portage City to the St. Croix River or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, within ten years from June 3, 1856, and to complete those portions between Madison and Portage City, and between Columbus and Portage City, simultaneously as near as practicable, and by Dec. 31, 1858;

That in case the company should violate the provisions of the act of Oct. 11, 1856, the legislature of Wisconsin might repeal that act, and might revoke the rights and franchises therein conferred, so far as the same had not been performed and fulfilled, and so far as the rights and privileges thereby granted had not become complete and absolute.

The La Crosse & Milwaukee Railroad Company promptly accepted the grant, lands, rights and privileges conferred by the act of Oct. 11, 1856, upon the terms, conditions and restrictions therein contained.

On the thirty-first of December, 1856, the company executed to Bronson and others, as trustees, a deed of trust or mortgage containing the usual provisions, covering all the property which then constituted or might thereafter constitute, or be a part of the road of the grantor from Madison by way of Portage to St. Croix River or lake, between townships twenty-five and thirty-one, and from Portage to La Crosse, to secure bonds amounting to $10,000,000, proposed to be issued for the construction of said road, including all lands granted or intended to be granted to that company, so far as the same pertained or were applicable to the construction of the road from Madison by way of Portage to the St. Croix River or lake, and also all the property which the company might thereafter acquire, as fully and amply as the same might or could be conveyed if the roads had then been fully constructed and completed, and also the particular lands granted by the acts of June 3, 1856, and Oct. 11, 1856, so far as the same were applicable to the construction of the road from Madison to St. Croix River or lake.

Subsequently, in March, 1857, the La Crosse & Milwaukee Railroad Company was authorized, by an act of the legislature of Wisconsin, to transfer and convey to the St. Croix & Lake Superior Railroad Company all its right, title and interest in the lands, theretofore granted to it by the State, which lie north of a point of intersection with St. Croix River or lake, upon the making of which conveyance the grantee should possess all the rights, powers, and privileges, in regard to the construction of the road from such point of intersection to the west end of Lake Superior and to Bayfield, and in regard to the application and disposal of such lands, which had been conferred upon the grantor company by said act of Oct. 11, 1856; and the grantor company, from the date of such convey-

ance, should be exonerated from all liability or duty as to the construction of that portion of the original line north of the St. Croix River or lake.

On the tenth of March, 1857, the La Crosse & Milwaukee Railroad Company executed to the St. Croix & Lake Superior Railroad Company the conveyance authorized by the act to which reference has just been made. It contained, however, this clause:

"But it is hereby expressly understood between the parties hereto, that the said La Crosse & Milwaukee Railroad Company *possesses* and does not surrender or release the right of selecting any lands within fifteen miles of and more than six miles from the route of the said road or roads *between the St. Croix River or lake and the west end of Lake Superior, and also between the said route and Bayfeld*, for the purpose of making up any deficiency which does or may exist in the quantity of lands to which the said La Crosse & Milwaukee Railroad Company is or may be entitled upon that point (*part*) of its line extending *from Madison to the St. Croix River or lake.*"

By the same instrument, the St. Croix & Lake Superior Railroad undertake to construct the designated roads, north of St. Croix River or lake to the west end of Lake Superior and to Bayfield, within ten years after June 3, 1856.

Following chronologically, as far as possible, the history of the events as they transpired and were connected with the proposed line of road, we find:

That on the second of August, 1858, there was certified to the governor of Wisconsin the completion of the La Crosse & Milwaukee Railroad Company of twenty additional miles westward from Portage City, making sixty-one continuous miles from that city westwardly to Tomah, in the direction of St. Croix River or lake, so as to admit

of the running of regular trains, both freight and passenger. But on the twenty-third of July, 1858, the governor refused to certify the same to the secretary of the interior, placing his refusal upon the ground that the conditions upon which the grant was made by the State to the company had not been complied with, in that the company had not built any road from Madison and from Columbus to Portage, simultaneously or at all, while both of such roads—from Madison to Portage and from Columbus to Portage—were to have been completed by Dec. 31, 1858.

After the location of the line from Madison to Portage, in June, 1857, and prior to 1861, the La Crosse & Milwaukee Railroad Company partially graded portions thereof, expending from $50,000 to $75,000.

By an act of the legislature of Wisconsin, approved April 12, 1861, the Sugar River Valley Railroad Company was authorized to build and operate a railroad from Madison and the village of Columbus, on the most direct and feasible routes, to Portage—both roads to be completed simultaneously, as near as practicable, and to be completed by Dec. 31, 1863. For the purpose of aiding in the construction of such roads, there was granted to that company all the interest and estate, then present and prospective, of the State in and to so much of the lands granted by the United States to Wisconsin by the act of June 3, 1856, as was or could be made applicable to the construction of that part of the railroad described in said last-named act, lying between Madison and Portage, together with all the rights, privileges, and immunities conferred or intended to be conferred by the act of Congress, as to so much of said grant of land. The act provided for the acquisition of title to the land by the company, in the same mode and upon the same conditions substantially as prescribed in the act of Oct. 11, 1856, in relation to the La Crosse & Milwaukee Railroad Company.

The act provides also—

That in case the Sugar River Valley Railroad Company should construct their road, or any part of it, upon or over any route upon or over which any railroad company was authorized to construct a railroad, or upon or over which it had prior to the date actually surveyed or located its line of railroad, then it should be the duty of the Sugar River Valley Railroad Company to settle with such railroad company, upon principles of justice and equity, for all the property and rights of property which it should take, injure, or destroy, and pay therefor whatever it should be reasonably worth.

That in case the company should fail to expend at least $50,000 in the construction of said road within one year, or should fail to complete the road from Madison to Portage, so as to admit of the running of regular trains upon the same by Dec. 31, 1863, or should otherwise violate the provisions of said act of April 12, 1861, the legislature might repeal the same, and revoke and annul all the rights and franchises therein conferred upon said company, so far as the same had not been performed and fulfilled, and so far as the rights and privileges granted had not become complete, absolute, or vested.

That so much of the act of Oct. 11, 1856, and so much of the grant of lands thereby granted to the said La Crosse & Milwaukee Railroad Company as were or could be made applicable to the construction of a railroad from Madison to Portage, and from Columbus to Portage, and all the rights, privileges, and franchises thereby conferred, granted, and conveyed to and upon the La Crosse & Milwaukee Railroad Company, so far as the roads from Madison to Portage, and from Columbus to Portage, and the lands granted to aid in the construction of the same were concerned, were thereby repealed, revoked, annulled, and declared void.

In January, 1862, a decree of foreclosure and sale was rendered in the District Court of the United States for the District of Wisconsin, of the trust deed executed by the La Crosse & Milwaukee Railroad Company to Bronson and others. The sale under this decree took place April 5, 1863, the purchasers being William Wallace and William H. White.

On the twentieth of January, 1863, the Sugar River Valley Railroad Company failed, suspended payment, and practically closed all operations on the line between Madison to Portage, but, prior to that date, it had expended for grading, and in acquiring the right of way, about $40,000.

By an act approved first of April, 1863, the Tomah & Lake St. Croix Railroad Company was incorporated, with authority to build and operate, on such route, or from such point as the directors should determine in Tomah, on the track of the Milwaukee & La Crosse Railroad, or any other railroad running out of Tomah (that being the point westward of Portage City to which the sixty-one miles of road from Portage City, constructed in 1857 and 1858 by the La Crosse & Milwaukee Railroad Company, extended), by way of Black River Falls, thence by the most feasible route to such point on the Lake St. Croix, between townships twenty-five and thirty-one, as the directors should determine. For the purpose of aiding in the construction of said railroad there was granted to that company all the interest and estate, then present and prospective, of Wisconsin, in and to so much of the lands granted by the United States, by the act of June 3, 1856, as was or could be made applicable to the construction of that part of said railroad lying *between the village of Tomah and Lake St. Croix*, together with the rights, privileges, and immunities conferred, or intended to be

conferred, by said act of June 3, 1856, as to so much of said grant,—the title to the lands thus granted to vest in the same mode and upon the same conditions, substantially, as those prescribed in reference to the La Crosse & Milwaukee Railroad Company by the act of Oct. 11, 1856.

The act further provided that so much of the act of October 11, 1856, and so much of the grant thereby of lands to the La Crosse & Milwaukee Railroad Company as was or could be made applicable to the construction of a railroad from Tomah to Lake St. Croix, and all the rights, privileges, and franchises thereby conferred, granted, and conveyed to the said La Crosse & Milwaukee Railroad Company, so far as the road from Tomah to St. Croix and the lands therein granted to and in the construction of the same were concerned, were thereby repealed, revoked, annulled, and declared void.

On the fifth of May, 1863, Wallace and White received a deed from the marshal, and upon the same day organized a corporation under the name of Milwaukee & St. Paul Railway Company, to which was conveyed by the decretal purchasers, among other things, the lands granted or intended to be granted to the La Crosse & Milwaukee Railroad Company by virtue of the acts of June 3, 1856, and October 11, 1856, so far as lands pertained or were applicable to the construction of the roads from Madison by way of Portage to the St. Croix River or lake.

By an act approved March 31, 1864, the St. Croix & Lake Superior Railroad Company was authorized and empowered to preserve and protect the timber growing or being upon any of the lands theretofore granted by Congress to the State of Wisconsin by the act of June 3, 1856, and "which are situated within fifteen miles of the located line of such company's railroad."

We have now stated, so far as we have been able to collect them from the immense mass of papers before us, the important facts in connection with the lines of railroad between Madison via Portage and St. Croix River to the west end of Lake Superior and to Bayfield, which transpired between the passage of the act of June 3, 1856, and the acceptance by the State of the act of the fifth of May, 1864. At the date last named, as we have shown, no part of the line between Madison and Portage had been constructed. Nothing had been done except to locate and partially grade the lines between those points. The company charged with the duty of completing the road from Madison to Portage by December 31, 1863, had, prior to May 5, 1864, failed and suspended operations, and was in suspension at the last-named date. Between Tomah and St. Croix Lake, and between St. Croix Lake and the west end of Lake Superior and Bayfield, nothing whatever had been done in the way of construction prior to May 5, 1864. The respective companies seeking or claiming the benefit of or operating under the grant of June 3, 1856, had done substantially nothing between Tomah and Lake Superior beyond locating their lines on the designated routes.

Returning to the inquiry whether the acceptance by the State of the provisions of the act of May 5, 1864, was inconsistent with any rights which then belonged to the predecessors in interest of the parties to this cause, let us first examine the case as to—

THE WEST WISCONSIN RAILROAD COMPANY,

formerly the Tomah & Lake St. Croix Railway Company. It seems to be clear that that company, at least, is not in any position to object to the administration of the congressional grant upon the coterminous principle. It would

seem to be estopped, upon every principle of equity, from asserting any claim to supply its deficiency of land, if any exists, out of lands beyond its line and along the road constructed and to be constructed by other companies north of its line and between St. Croix River or lake and Lake Superior. The State, by an act approved March 29, 1865, conferred upon that company the benefit of the increased grant, and, among other things, all and singular the rights, privileges, and interests conferred and bestowed upon the State by the act of May 5, 1864; including the privilege given *by that act*, as to the extension of time for building the road from Tomah to St. Croix River or lake, between townships twenty-five and thirty-one. The company accepted the grant upon the same conditions and restrictions as were imposed by Congress upon the State in the act of 1864. Besides, it accepted from Congress, by joint resolution approved July 13, 1868, a further extension of three years for the completion of its road beyond the time limited by the act of 1864. It accepted and caused to be filed with the secretary of the interior a certificate from the governor of the State, dated September 10, 1870, showing that the first eighty miles constructed by it had been built and completed in the manner required by the act of May 5, 1864.

It accepted and caused to be filed a similar certificate as to another section of twenty continuous miles. After these repeated recognitions of the act of May 5, 1864, after accepting the benefits, the extension of time and all the privileges given by that act and by the act of 1868, it should not be heard to claim lands beyond its terminal points and within the limits granted to other companies who have entered upon the work of construction under the authority and upon the faith of the act of May 9, 1864. If, as claimed, the North Wisconsin Railroad

Company, which is engaged in constructing the road from St. Croix Lake or river to Bayfield, has received grants of land in violation of the coterminous principle prescribed in the act of May 5, 1864, that is a matter between the State or the United States and that company, of which the West Wisconsin Railroad Company may not complain. And so, if the West Wisconsin Railroad Company has, as urged, received lands along or opposite to its line which it had no lawful right to receive under the act of 1864, that is not a matter to be corrected in this litigation, or of which other companies can complain under the present issues, provided such other companies were not themselves entitled to the lands thus alleged to have been illegally appropriated and received by the West Wisconsin Railroad Company. As to whether it has, in fact, received patents for lands to which it was not entitled, the court expresses no opinion. Its decision upon the claim of the West Wisconsin Railway Company is restricted to the single point that it cannot supply its alleged deficiency out of the lands north of St. Croix River or lake and beyond its own terminal points, whether such lands are claimed by the North Wisconsin Railway Company, the Chicago, Portage & Superior Railway Company, or the Wisconsin Central Railway Company.

MADISON AND PORTAGE RAILWAY COMPANY.

Our next inquiry relates to the claim of the Madison and Portage Railway Company to supply its alleged deficiency from lands north of St. Croix River or lake.

We have already seen that the rights, privileges and franchises conferred in 1856 upon the La Crosse & Milwaukee Railroad Company, so far as the roads from Madison to Portage and from Columbus to Portage, and

the lands granted to aid in the construction of the same were concerned, were, in the year 1861, revoked, annulled, and declared void by the State. The right of the State to make such revocation cannot well be disputed in view of the reservations in the act of Oct. 11, 1856, and the failure of the La Crosse & Milwaukee Railroad Company to complete such roads by the time stipulated in that act, viz.: Dec. 31, 1858. What the La Crosse & Milwaukee Railroad Company may have previously done upon the line between Madison and Portage, in the way merely of grading, did not create any rights in its favor against the State or against the United States—certainly no rights that were complete or absolute, or which prevented the State in 1861 from recalling its grant to that company.

We have also seen that in the statute of 1861, declaring such revocation, the right to construct the road from Madison to Portage was conferred upon the Sugar River Valley Railroad Company, together with the lands, privileges, and immunities, as to that part of the original line, which had been previously conferred upon and granted to the La Crosse & Milwaukee Railroad Company. But the Sugar River Valley Railroad Company (the predecessor of the Madison and Portage Railroad Company) did not comply with the terms of the said act of 1861. It did not, as it expressly agreed to do, expend upon its road, within one year from the passage of the act, the sum of $50,000. Nor did it, by Dec. 31, 1863, complete the road from Madison to Portage, so as to admit of the running of regular trains upon the same, or at all. On the contrary, as early as Jan. 26, 1863, it failed, suspended payment, and practically closed all operations on its road. It had not resumed operations when the act of May 5, 1864, was passed, or when its provisions were accepted by the State. It had not, at either date, acquired any right which was "com-

plete, absolute, or vested." It was in a position where the State, by virtue of the reservations of power contained in the act of 1861, could revoke all the authority conferred upon it, including the right to earn lands as compensation or bounty for constructed road.

Its violation of the act of 1861, in the particulars named, authorized the State, at the time of its acceptance of the act of May 5, 1864, to repeal the act of 1861, and revoke the grant thereby made. The State did not, so far as I can find in the record, formally exercise such right of appeal and of revocation, but it did, on the twentieth of March, 1865, as it might lawfully have done, that which was practically equivalent to a revocation of the rights granted in the act of 1861, that is to say, it agreed with the United States to execute the trust created by the act of 1864, pursuant, in all things, to the terms, limitations and conditions of that act—an agreement which, we have seen, required the disposal, according to the coterminous principle, of all the lands granted by the act of 1864, among the several companies constructing, under the sanction of its authority, each continuous twenty miles. That agreement embraced all the lands beyond or northwest of Tomah and as far north as Lake Superior, and was inconsistent with any right, in the Sugar River Valley Railroad Company, thereafter to earn and appropriate lands, beyond *its* own line and within the limits, terminal and lateral, prescribed by the act of May 5, 1864.

If it was competent for the State, on March 20, 1865, as it unquestionably was, to revoke the grant of 1861 to the Sugar River Valley Railroad Company, it was equally competent, without a formal revocation of such grant, to stipulate with the United States that it would dispose of the lands granted and received under the act of 1864, according to the terms therein prescribed. If we are correct

in this view it results that no action of the State subsequent to March 20, 1865, continuing in force the grant of 1861 to the Sugar River Valley Railroad Company, or substituting the Madison & Portage Railroad Company to the enjoyment of the rights originally conferred upon the Sugar River Valley Railroad Company, could affect its obligation to the United States to respect and execute the provisions of the act of May 5, 1864. It is enough for the disposition of the claim of the Madison & Portage Company that the Sugar River Valley Railroad Company had no substantial right, on March 20, 1865, which prevented the State from agreeing to execute the trust created by the act of May 5, 1864, pursuant in all things to its provisions, including the provision which declared the coterminous principle. The effect of the act of May 5, 1864, and of its acceptance by the State, so far as the Sugar River Valley Railroad Company, or its successor, was concerned, was to protect or withdraw the lands described in that act from any claim of that company on account of deficiency lands to which they might become entitled by actual construction of road, at a subsequent date, under the grant of June 3, 1856.

WISCONSIN RAILROAD FARM-MORTGAGE LAND COMPANY.

We will now consider the case of the Wisconsin Railroad Farm-Mortgage Land Company, which claims to be the successor of the La Crosse & Milwaukee Railroad Company, as to all rights accruing upon the construction of the sixty-one miles of road between Portage and Tomah in the years 1857 and 1858.

It will be remembered that the La Crosse & Milwaukee Railroad Company, on the tenth of March, 1857, under authority conferred by the State, transferred to the St.

Croix & Lake Superior Railroad Company the right to construct the original line north of St. Croix Lake or river, and such benefits and privileges as were connected with the grant contained in the act of June 3, 1856. The indenture between the parties contained, as has been seen, an acknowledgment that the La Crosse & Milwaukee Railroad Company *then possessed* and did not surrender or release the right to select lands within fifteen miles of or more than six miles from the route of the roads north of the St. Croix River or lake, to supply any deficiency which then existed or might thereafter exist in the quantity of lands to which the La Crosse & Milwaukee Railroad Company was or might be entitled upon that part of its line extending from Madison to the St. Croix River or lake. It does not appear that the State previously assented to, or contemplated, such an arrangement between the parties. But, waiving any consideration of its validity because of the absence of such assent, it is clear that the State, after its acceptance of the act of 1864, and before the date of its grants to the North Wisconsin Railroad Company, the Chicago & Northern Pacific Air-Line Railway Company, and Wisconsin Central Railway Company conferred upon the Wisconsin Railroad Farm-Mortgage Land Company the benefit of the reservation contained in the contract and indenture of March 10, 1857.

The purchasers at the decretal sale of the rights and interests conveyed by the mortgage to Bronson and others, by apt and sufficient words conveyed and transferred to the Milwaukee & St. Paul Railroad Company before the passage of the act of May 5, 1864. Although that company necessarily took, subject to the right of appeal and revocation, reserved to the State in the charter of the La Crosse & Milwaukee Railroad Company, and was, therefore, for the reasons already stated, in no position to ob-

ject to the State's accepting and agreeing to execute the provisions of the act of May 5, 1864—the State not having previously assented to the contract and reservation contained in the indenture of March 10, 1857—we find that as early as the year 1868, the State agreed that the farm mortgagors might have the benefit of any claim to the lands donated by Congress which the Milwaukee & St. Paul Railroad Company had acquired as the successor of the La Crosse & Milwaukee Railroad Company, on account of the construction of the road from Portage to Tomah. If, without the consent of Congress, no such claim was maintainable under the act of June 3, 1856, nevertheless, in 1868, Congress authorized the legislature to dispose of the lands granted, and which might have accrued and been certified to the State, under the act of June 3, 1856, to aid in the construction of the road from Madison or Columbus via Portage to St. Croix River or lake, for the benefit of the Wisconsin Railroad Farm-Mortgage Land Company. We find also that the legislature of Wisconsin, by an act approved March 23, 1872, declared the Wisconsin Railroad Farm-Mortgage Land Company to be the legal successor (as to the rights acquired and conferred in and to a portion of the lands granted by Congress to the State of Wisconsin, by an act approved June 3, 1856), of the La Crosse & Milwaukee Railroad Company, as *fixed and reserved in and by the contract entered into by and between the La Crosse & Milwaukee Railroad Company and the St. Croix & Lake Superior Railroad Company, executed March* 10, 1857, and duly filed in the office of the secretary of State of Wisconsin.

The act directed the governor to carry out the provisions of that contract and convey to the Wisconsin Railroad Farm-Mortgage Land Company, out of the lands granted

by the act of June 3, 1856, such quantity of lands as had been, or thereafter might be, made applicable thereto, as should make, together with the lands theretofore conveyed to that company, the exact number of six sections for each mile of the railroad constructed by the La Crosse & Milwaukee Railroad Company from Portage to Tomah, a distance of sixty-one miles. At the same time, or on the day previous, the acts conferring the grants of June 3, 1856, and May 5, 1864, upon the St. Croix & Lake Superior Railroad Company were repealed, but with the proviso that nothing therein should be construed to impair the rights of the Wisconsin Railroad Farm-Mortgage Land Company to the grant of June 3, 1856. Congress and the State seem to have concurred in desiring to provide full compensation, in lands, to the Farm-Mortgage Company for the sixty-one miles of road constructed and in use long prior to 1864. Such was the unfulfilled engagement of the State to that company when, in 1874, to the North Wisconsin Railway Company and the Chicago & Northern Pacific Air-Line Railway Company was granted the right, title and interest which the State then had or might thereafter acquire in the lands granted by the acts of June 3, 1856, and May 5, 1864, to aid in the construction of the roads north of St. Croix River or lake. The two companies, it is clear, took their grants with the knowledge that the State had, by a previous act, directed the governor to execute the contract of March 10, 1857, which expressly recognized the right of the La Crosse & Milwaukee Railroad Company to supply any deficiency south of St. Croix River or lake out of lands north of that river or lake.

It seems to me, therefore, that recognizing the right of the State to accept the grant of May 5, 1864, without doing violence to the then existing rights of any of these companies, or of their predecessors, it yet became bound

by its subsequent ratification of the contract of March 10, 1857, before the date of the grants to the North Wisconsin Railroad Company, and the Chicago & Northern Pacific Air-Line Railway Company, to grant to the Wisconsin Railroad Farm-Mortgage Land Company, out of the lands north of St. Croix River or lake, a quantity sufficient to satisfy its claim for the construction by its recognized predecessor of the sixty-one miles of road between Portage and Tomah. The claim of the Wisconsin Railroad Farm-Mortgage Land Company related to road constructed south of Tomah, and neither that company nor its predecessor were required to accept the provisions of the act of 1864. That part of the line described in the original act was not embraced by or referred to in that act, for the reason, doubtless, that it had in fact been constructed before its passage. It was, therefore, left under the operation of the act of June 3, 1856. And even if that act did not require deficiency lands to be selected upon the coterminous principle, it was competent for the State, in view of the action of Congress, after accepting the act of 1864, and before conferring the grant therein contained upon the North Wisconsin and Chicago & Northern Pacific Air-Line Railway Company, to allow the Farm-Mortgage Land Company to select the deficiency lands earned by its predecessor for constructed road, out of such of the lands north of St. Croix Lake or river, as were embraced in the indemnity limits prescribed by the act of June 3, 1856. This it did by an express approval in 1872, of the contract of May 10, 1857, and by requiring the governor to carry it into effect.

I am of opinion that the right thus recognized by the State should be enforced. But in giving effect to the claim of the Wisconsin Railroad Farm-Mortgage Land Company, it is not necessary, I think, to disturb the loca-

tion of lands already made by the North Wisconsin Railroad Company. Upon this particular point, however, no final decision is now made. The Farm-Mortgage Company was not entitled to any specific sections of land, and its claim can doubtless be satisfied without disregarding the selection or location of lands by the North Wisconsin Railroad Company for road constructed. But, in this respect, the rights of those two companies can be more satisfactorily determined after a report by the master, to be hereafter made. And until the coming in of that report, the court also reserves, for determination, the right of the several parties other than the West Wisconsin Railroad Company and the Madison & Portage Railroad Company in the fund spoken of in argument as the trespass fund.

Some question has been made as to the precise extent of the grant under the two acts of Congress. We understand that it covers six sections in width on each side of the line, in the one case, and ten sections in the other, of lands in place, as they existed on the ground, so that if any of these sections were fractional, or, from any cause, were not full sections, the State could not make up the deficiency from lands in the indemnity limits, because as to the lands in place, the act operates directly by specific description; but, when there was not land in place to meet the call of the grants, whether the deficiency was more or less, it was competent to supply it by sections from the indemnity limits. Or, if, as might happen, there were parts of sections of the lands in place excluded from the grants by the terms of the acts, it was competent to supply the deficiency from the indemnity limits by a similar legal subdivision of the land. It would seem to be impracticable to administer the trust on any other basis. In supplying deficiencies, it must be by sections, whether full or fractional, and by legal subdivisions. Deficiencies

in place limits, caused by sales or pre-emptions previous to the location of routes, whether before or after the passage of the acts, may be supplied from the indemnity limits.

Although the Wisconsin Central Railroad Company has filed no cross-bill, and has only presented its claims by answer, it may not be improper for us to express an opinion upon the effect of the grant in the act of 1864, when there is a conflict or overlapping of lands granted to the different railroads as they approach Lake Superior, large quantities of land being thus granted by the act to different roads. These grants are made by the same law operating on the lands granted at the same time. The Wisconsin Central Railroad has completed its road to Ashland, on Lake Superior, a point not named in the act, but up to the present time, no road has been finished to Bayfield, or to the west end of Lake Superior, and, without foreclosing the parties upon this question, we should be inclined to think that the different companies, as to all lands overlapping in the respective grants, must be considered tenants in common, without regard to priority of construction.

I am not sure that I have touched upon every point in this complicated cause, which is essential to the determination of the rights of parties. Nor am I quite sure that the recital of facts contained in this opinion is, in all respects, full and accurate. It would have been gratifying to me to have had more time than has transpired since the conclusion of the oral argument for the examination of the record and the consideration of the many difficult questions suggested by counsel. But the interest of parties seemed to require an early disposition of the cause, and I have not felt at liberty to postpone an announcement of my conclusions to such a time as would

give me all the opportunity for careful deliberation which the large interests involved seemed to demand. I have been the more willing to pursue this course since counsel concurred in stating that the cause, however decided in this court, would be taken to the Supreme Court of the United States for final determination.

Upon the filing of this opinion in court, counsel will prepare an order, dismissing the bill of complainant and the cross-bill of the West Wisconsin Railroad Company, and referring the cause to the special master with such directions as are consistent with this opinion and as will facilitate the final determination of all the remaining issues.

Office Supreme Court U. S.
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MAR 12 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 245.

HENRY F. SPENCER,
PLAINTIFF IN ERROR,
v.
ALEXANDER McDOUGALL.

BRIEF FOR PLAINTIFF IN ERROR.

EDWIN H. ABBOT,
LOUIS D. BRANDEIS,
HOWARD MORRIS,
WILLIAM H. DUNBAR,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1894.

HENRY F. SPENCER,
PLAINTIFF IN ERROR,

v.

ALEXANDER McDOUGAL.

BRIEF FOR PLAINTIFF IN ERROR.

INTRODUCTORY STATEMENT.

This action was brought on February 17, 1891, by Henry F. Spencer against Alexander McDougal in the Circuit Court of the United States for the Western District of Wisconsin to recover possession of one hundred and sixty acres of land, comprising the east half of the southwest quarter and the east half of the northwest quarter of section 7, township 47 north, of range 4 west, in Ashland county, Wisconsin, and damages for unlawful withholding of possession. The land is situated within the limits of the city of Ashland, between the lines of the Bayfield Branch of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company (hereinafter called the Omaha) and of the Wisconsin Central Railroad Company (hereinafter called the Central). The land is between six and ten miles from the Omaha road and less than ten miles from the Central road. It is worth about one hundred dollars an acre.

The plaintiff claims title to the land under a deed from the Omaha Company to which a patent had been issued by the State of Wisconsin, pursuant to an agreement between the Omaha and Central companies, designed to settle controversies between them

as to their respective rights under the grants made by Congress to the State in the acts of June 3, 1856, 11 Stat. 20, and May 5, 1864, 13 Stat. 66. The defendant denies that the plaintiff has any title.

The act of June 3, 1856, granted to the State of Wisconsin land to aid in the construction of a railroad, part of which was to run from St. Croix river or lake to the west end of Lake Superior and to Bayfield. This grant was of every alternate odd-numbered section for six sections on each side of the road, with a right to select indemnity lands within fifteen miles on each side. The act of May 5, 1864, by section 1, granted to the State of Wisconsin land to aid in constructing a railroad between the same termini, and also by section 3 to aid in constructing a road through the central part of the State to Bayfield. The grant made by each section of this act was of every alternate odd-numbered section for ten sections on each side of the road, with a right to select indemnity lands within twenty miles on each side. The Omaha Company eventually became entitled to the grant under section 1 of the act of May 5, 1864, as well as to the grant for the branch to Bayfield under the act of June 3, 1856, so far as the latter remained in force. The Central Company became entitled to the grant under section 3 of the act of May 5, 1864. The two roads converge as they approach Ashland, so that the grants overlap. The land in question in this suit is within this overlap, and is part of an odd-numbered section within the ten miles limits of the grant to each of the companies. The agreement pursuant to which the State of Wisconsin patented the land to the Omaha Company was entered into by the companies to adjust the disputes arising from their conflicting claims to the land within the overlap, so that the plaintiff's title unites the rights of both companies to this land, and, unless neither company became entitled to the land, he must recover.

The facts material to the decision of the suit are in most respects identical with those in the case of the *Wisconsin Central Railroad Company* v. *Forsythe*, argued at the present term of this court. Each action is brought to recover land claimed by virtue of the grants made in the act of May 5, 1864, and situated within the

indemnity limits of the grant made by the act of June 3, 1856. In the present case, however, the land is within the place limits of the grants made by both the first and third sections of the act of 1864, and the plaintiff has whatever rights were acquired under either section. In the other case, the land is within the place limits of the grant made by the third section only.

Statement of Facts.

By the act of June 3, 1856, 11 Stat. 20, the United States granted land to the State of Wisconsin to aid in the construction of two lines of railroad: the westerly line from Madison or Columbus *via* Portage City to the Saint Croix river or lake, and thence to the west end of Lake Superior, including a branch to Bayfield; the easterly line from Fond du Lac on Lake Winnebago to the state line.*

In pursuance of Laws of Wisconsin, 1856, c. 118; 1856, c. 122; and 1857, c. 230, the St. Croix & Lake Superior Railroad Company became entitled to the benefit of this land grant to aid in the construction of the contemplated road from St. Croix river or lake to the west end of Lake Superior and to Bayfield (Record, p. 7). On November 2, 1857, the directors of this company located the line of the railroad (Record, p. 11), and on July 17, 1858, the definite location of the Bayfield Branch was filed in the General Land Office (Record p. 8).

On May 29, 1856 (the act of June 3, 1856, having then been passed by both houses of Congress and been sent to the President for his approval), the Commissioner of the General Land Office, by telegraph, instructed the land officers in the several land districts in the State of Wisconsin to withdraw from sale and location all lands in their respective districts until further orders. Those instructions were confirmed by letter on June 12, 1856. By letter

* This act is printed in full in the brief for the plaintiff in error in *Wisconsin Central Railroad Company* v. *Forsythe*, argued at this term, page 4, to which we beg leave to refer.

dated October 26, 1856, the Commissioner repeated his instructions to the several land officers, directing that on the filing in their respective offices of duly certified maps of the definite location of any of the roads mentioned in the act they should without further instructions cease to permit locations for any purpose on land within fifteen miles of the route (Record, p. 12). Under date of March 13, 1858, diagrams showing the established six and fifteen miles limits were transmitted from the General Land Office to the several district land officers in the State (Record, p. 11). On March 1, 1859, the Commissioner of the General Land Office instructed the several district land officers to "continue to reserve, as heretofore," all lands between the six and fifteen miles limits "from sale or location for any purpose whatever" (Record, p. 13).

Prior to May 5, 1864, the only part of the westerly line of roads provided for in the act of 1856 that had been constructed, was about sixty-one miles between Portage and Tomah, built in the spring of 1858 (Record, p. 10). The land grant contained in that act having thus proved wholly inadequate to induce the building of the contemplated road, Congress passed the act of May 5, 1864, 13 Stat. 66. By this act the unbuilt portion of the contemplated line of railroad from Portage to the west end of Lake Superior was divided at the St. Croix river into two parts, for each of which an increased grant was made. In addition, the act made a grant of like amount for a new route to Lake Superior running through the central part of the State.*

The benefit of the grant contained in the first section of this act was duly conferred by the State of Wisconsin upon the St. Croix & Lake Superior Railroad Company (Record, p. 8), which, on April 22, 1865, adopted as the definite location for the Bayfield branch, the location filed on July 17, 1858, under the act of June 3, 1856 (Record, p. 8). No part of the railroad from St. Croix river or lake to the west end of Lake Superior, or of the branch to

* This act is printed in full in the brief for the plaintiff in error in *Wisconsin Central Railroad Company* v. *Forsythe*, argued at this term, page 4, to which we beg leave to refer.

Bayfield, was built by this company. The grants to it were repealed (Laws of Wis. 1869, c. 90; 1872, c. 89, — Record, p. 9), and in 1874 the state granted to the North Wisconsin Railway Company the benefits of the grants contained in the acts of June 3, 1856, and May 5, 1864, for the construction of the contemplated road from St. Croix river or lake to the west end of Lake Superior and to Bayfield (Record, p. 9). This grant from the State, subsequently, by consolidation, became vested in the Omaha Company (Record, p. 13).

On February 28, 1866, the Commissioner of the General Land Office transmitted to the district land officers in Wisconsin a diagram showing the limits of grants contained in the first section of the act of May 5, 1864, and directed the lands within those limits to be withdrawn (Record, p. 11).

The branch to Bayfield, with part of which the land in dispute is coterminous, was completed by June 19, 1882 (Record, p. 13).

The benefit of the grant contained in the third section of the act of May 5, 1864, became vested in the Portage, Winnebago & Lake Superior Railroad Company, in pursuance of Laws of Wisconsin, 1866, c. 314; 1866, c. 362; 1869, c. 257 (Record, pp. 23, 24, 29); and on February 4, 1871, its name was changed to the Wisconsin Central Railroad Company (Record, p. 30).

By joint resolution of June 21, 1866 (14 Stat. 360), Congress approved the route fixed by the State of Wisconsin in the act of 1866, c. 362, above referred to, and authorized the selection and application of lands under the land grant in the third section of the act of May 5, 1864, for and to that line. A map of definite location was duly filed, and on December 10, 1869, the Commissioner of the General Land Office, by letter to the receiver and register at Bayfield, Wis., enclosing a diagram showing the limits of the land grant, directed the withdrawal of the lands included within those limits (Record, p. 30).

The Central Company completed the first section of its road south of Ashland, by October 19, 1873. The land in question is coterminous with this section.

As they approach the city of Ashland, the roads of the plaintiff and of the Bayfield branch of the Omaha Company converge so that the land grants appurtenant to them overlap. The land in dispute is within the ten miles place limits both of the grant in the first and of the grant in the third section of act of May 5, 1864, and between the six and the fifteen miles indemnity limits of the grant in the act of June 3, 1856 (Record, pp. 8, 11, 24).

Controversies having arisen between the Omaha Company and the Central Company in consequence of the overlapping of their land grants, the two corporations entered into an agreement, dated February 12, 1884, for the purpose of settling all matters in dispute (Record, p. 19). By this agreement it was provided, among other things, as follows: —

"Section I. It is agreed that the Central Company shall have . . . 2d. All that part of the four-mile strip outside of the six-mile of Omaha and within the ten-mile limit of the Central Company's grant, and within townships 45, 46 and 47, ranges 4 and 5 west."

"Section II. The Omaha Company is to apply for, and take from the State to it, patents to the lands embraced in the foregoing subdivisions 1, 2, and 3, and it is to take patents from the State for the undivided half of the lands described in the foregoing subdivision 4."

"Section IV. The Omaha Company will, upon receiving from the State patents to lands described in the foregoing subdivisions 1 and 2, execute and deliver to Henry F. Spencer a deed conveying the said land by quitclaim to said Spencer, except so much thereof as shall have been contracted to be sold by the Omaha Company. And as to lands so contracted to be sold by the Omaha Company, the said company shall carry out said contracts and account to said Spencer for the proceeds of the sales under the said contracts." (Record, pp. 19, 20.)

The lands in question are included in subdivision 2 of section 1 of the agreement.

Pursuant to this agreement, the Omaha Company received from the State of Wisconsin a patent dated April 23, 1885, covering about thirty-nine thousand acres, and including the land in dis-

pute (Record, p. 14). On June 24, 1885, the Omaha Company conveyed this land to the plaintiff in error (Record, p. 18).

At the trial the defendant offered in evidence a certified copy of an alleged declaratory statement of one David J. Cooper, dated May 3, 1858, for the pre-emption of a quarter-section, including the northerly half of the land in dispute, together with a certified statement from the Ashland land office, containing a transcript from the official abstract of declaratory statements filed in the land office at Hudson, Wis., in May, 1858, on lands alleged in the certificate to have been unoffered. Among other entries, this statement contained an entry of the declaratory statement of David J. Cooper, above referred to, purporting to show that the date of settlement and the date of filing the statement was May 3, 1858. The plaintiff objected to this evidence, but his objection was overruled, and he excepted (Record, pp. 24–26).

The defendant also offered a similar certified copy of an alleged declaratory statement of one Christiana Mautshke, dated June 16, 1858, for the pre-emption of a quarter-section, including the southerly half of the land in dispute, and a similar certified statement giving a transcript of the official abstract of declaratory statements filed in June, 1858, purporting to show that the date of settlement under the declaratory statement of Christiana Mautshke was June 16, 1858, and the date of filing, June 23, 1858. The plaintiff objected to the admission of this evidence, but his objection was overruled, and he excepted (Record, pp. 26–28).

The defendant also offered in evidence a certified copy of an alleged order of the Commissioner of the General Land Office dated January 8, 1891, directing the opening and advertisement for entry of a large number of tracts of land, including the land in dispute. The defendant objected to the admission of this evidence, but his objection was overruled, and he excepted (Record, pp. 28, 29).

Shortly after the date of this order the defendant entered upon and occupied the land, and was in actual possession when the suit was brought.

The action was tried before a jury, and after all the evidence was in and after argument by counsel, the court instructed the jury to find a verdict for the defendant, and the jury thereupon, under that instruction, rendered such a verdict, finding the value of the land in dispute to be sixteen thousand (16,000) dollars. The plaintiff duly excepted to this instruction. Judgment was thereupon entered in favor of the defendant on the merits (Record, p. 31).

A bill of exceptions setting forth the substance of all the evidence given, substantially all of which is contained in the foregoing statement, was duly allowed, and the plaintiff sued out this writ of error:

Assignments of Error.

The court below erred, —

1. In holding that the land in question was not granted by the United States for the benefit either wholly of the road provided for in the first section of the act of May 5, 1864, or jointly for the benefit of that road and of the road provided for in the third section of that act.

2. In holding that the plaintiff in error did not acquire a good title to the land under the deed to him from the Omaha Company set forth in the bill of exceptions at page 18 of the record.

3. In holding that the plaintiff in error was not entitled to recover possession of the land in this action.

4. In admitting against the plaintiff's objections the several documents numbered 5, 6, 7, 8, and 9 set forth in the bill of exceptions on pages 24, 25, 26, 27, and 28 of the record, respectively.

5. In directing a verdict for the defendant at the trial of this case.

SYNOPSIS OF ARGUMENT.

The plaintiff has a good title to the land in dispute, and is entitled to recover in this action.

I.

The land in dispute was granted by the act of May 5, 1864, for the benefit either of the Omaha Company alone or of the Omaha and Central companies jointly.

1. The alleged pre-emption claims did not attach to the land before the map of definite location was filed, because the land was withdrawn from entry.

Wolcott v. *Des Moines Co.*, 5 Wall. 681, 688.
Wilcox v. *Jackson*, 13 Pet. 498.
Bullard v. *Des Moines & Fort Dodge Railroad*, 122 U.S. 167.
Riley v. *Wells*, 101 U.S. 766 (unreported).
Wolsey v. *Chapman*, 101 U.S. 755.
Hamblin v. *Western Land Co.*, 147 U.S. 531.

2. The land was not excluded from the operation of the first section of the act of May 5, 1864, by reason of its falling within the indemnity limits of the act of June 3, 1856, or by reason of the withdrawal of lands made by the Land Department to meet that grant.

Barney v. *Winona & St. Peter Railroad Co.*, 117 U.S. 228.

3. If the land in dispute was excluded from the grant made by the third section of the act of May 5, 1864, the Omaha Company became entitled to all of it.

See *United States* v. *Burlington &c. Railroad Co.*, 98 U.S. 334.

4. If the land in dispute was not excluded from the grant made by the third section of the act of May 5, 1864, the Omaha Company and Central Company were entitled to the land as tenants in common.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720.
Sioux City & St. Paul Railroad Co. v. *Chicago &c. Railway Co.*, 117 U.S. 406.
Donahue v. *Lake Superior &c. Co.*, 155 U.S. 386.

II.

All rights to the land in dispute arising under the act of May 5, 1864, have become vested in the plaintiff, and he now holds a good title.

1. An indefeasible title vested under the act of May 5, 1864, when the roads for which the grant was made were completed in compliance with its terms.

Schulenberg v. *Harriman*, 21 Wall. 44.
Ryan v. *Railroad Co.*, 99 U.S. 382.
Langdeau v. *Hanes*, 21 Wall. 521.
Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.
Deseret Salt Co. v. *Tarpey*, 142 U.S. 241.

2. All title to the lands in dispute under the act of May 5, 1864, has been conveyed to the plaintiff.

Record, pp. 18, 19.
See 11 Land Decisions, 613.
Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.

3. The action subsequently taken by the Land Department could not affect the title acquired by the plaintiff.

Dubuque & Pacific Railroad Company v. *Litchfield*, 23 How. 66.

Homestead Company v. *Valley Railroad*, 17 Wall. 153.
Shepley v. *Cowan*, 91 U.S. 330.
Cunningham v. *Lake Superior &c. Co.*, 155 U.S. 354, 375.

III.

The plaintiff can enforce his rights in this action.

Van Wyck v. *Knevals*, 106 U.S. 360.
Walden v. *Knevals*, 114 U.S. 373.
Whitney v. *Morrow*, 112 U.S. 693.
Doolan v. *Carr*, 125 U.S. 618.
Grinnell v. *Railroad Co.*, 103 U.S. 739.

ARGUMENT.

This action is brought to recover land in Wisconsin formerly part of the public domain. Neither party has a patent from the United States. The plaintiff seeks to recover on the ground that the land was granted to the State of Wisconsin by the act of May 5, 1864, 13 Stat. 66, to aid in the construction of railroads, and conveyed to him by the corporation to which the State transferred the benefit of that grant and issued its patent.

The land was included in the limits of the grant made by the first section of the act of May 5, 1864, to aid in building the branch to Bayfield, and also in the limits of the grant made by the third section of that act to aid in building the Central Company's road (Record, pp. 8, 11, 24). Both roads were constructed in conformity to the requirements of the act, and the Omaha Company and Central Company became entitled to lands granted by the first and third sections of the act, respectively. Since the lands in question were within the place limits of both these grants, and since both grants were earned by the roads to which the State allotted them, it is clear that the land must have passed to the State for the benefit of the one road or the other, or of the two jointly, unless it was for some reason excluded from the operation of the act of May 5, 1864.

The defendant denies that the land was included in the grant made by either section of the act of May 5, 1864, although within the place limits of both, and holds possession under an entry made by him upon the land in 1890 under the pre-emption law. He contends that the land was excluded from the grant made by the third section of the act of May 5, 1864, because it was within the indemnity limits of the earlier act of June 3, 1856, and within the limits of a withdrawal for indemnity purposes under that act made by the officers of the Land Department. He further asserts

that, under the grant made by the first section of the act of May 5, 1864, the Omaha Company became entitled only to an undivided half of the land; that in the final adjustment of the grant to the Omaha Company in the Land Office, the premises in dispute were not listed to it. The defendant also relies on certain alleged proceedings to pre-empt the land taken in 1858, as showing that a pre-emption claim had attached prior to the passage of the act of 1864, so that the land was excluded from the operation of that act. The plaintiff excepted to the admission of the evidence of these proceedings offered by the defendant.

It is submitted that, under the act of May 5, 1864, the land was granted either wholly to the Omaha Company, or to it and the Central Company as tenants in common; that there was no competent evidence to show that a pre-emption claim had attached before the passage of the act, and that the evidence offered, if competent, failed to prove that fact; that the Omaha Company either alone or in common with the Central Company acquired a perfect title to the land under the act of 1864; and that the title so acquired had vested in the plaintiff in severalty long prior to the bringing of this suit, notwithstanding any action taken by the Land Department.

I.

The State of Wisconsin became entitled to the land in dispute as a part of the grant made by the act of May 5, 1864, for the benefit of either the Omaha Company, or of the Central Company, or of both.

The only grounds on which the defendant seeks to exclude the land from the operation of the act of 1864 are that a pre-emption claim had attached before the grant took effect, and that the land was reserved to the United States at the time the grant was made. Neither ground is tenable.

1. The alleged pre-emption claims did not attach to the land

before the map of definite location was filed, because the land was withdrawn from entry.

(*a*) The defendant introduced at the trial, against the plaintiff's objection, copies certified by the register of the land office at Ashland, Wis., of two declaratory statements for the pre-emption of the land in question. One of these statements, dated May 3, 1858, purported to be made by David J. Cooper, and covered the northerly half of the land in question; the other, dated June 16, 1858, purported to be made by Christiana Mautshke, and covered the southerly half of the land. The defendant also introduced, against the plaintiff's objection, copies, certified by the register of the land office at Ashland, of the abstract of declaratory statements filed in the land office at Hudson, Wis., in May and June, 1858, respectively; these copies contained entries of the filing of the two declaratory statements above referred to, on May 3, 1858, and June 23, 1858, respectively. No other evidence was offered of any steps to pre-empt the land or any part of it.

This evidence was incompetent because, prior to the time both of the filing of the declaratory statements and of the alleged settlements, the land in question had been withdrawn from sale and location. The Commissioner of the General Land Office, by telegram on May 29, 1856, and by letter on June 12, 1856, directed all lands in the several districts in Wisconsin to be withdrawn from sale or location until otherwise directed (Record, p. 12). No contrary instructions were given until after the line of definite location had been fixed. The map of definite location was filed July 17, 1858, and on March 1, 1859, the Commissioner transmitted diagrams showing the place and indemnity limits, and directed that the local land officers should "of course, continue to reserve as heretofore" odd-numbered sections within the indemnity limits "from sale or location for any purpose whatever." It appears, therefore, that from May 29, 1856, to March 1, 1859, and thereafter, the lands within the indemnity limits of the grant made by the act of June 3, 1856, were withdrawn from sale and location for any purpose.

(*b*) This withdrawal was made by competent authority. The Commissioner of the General Land Office was the officer designated by law to perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the public domain.

Act of 25 April, 1812, c. 68, sec. 1, 2 Stat. 716.
Act of 4 July, 1836, c. 352, sec. 1, 5 Stat. 107.

The authority of the executive department to order such a withdrawal of lands, in order effectually to carry out the intention of Congress, cannot be doubted.

Wolcott v. *Des Moines Co.*, 5 Wall. 681, 688.

(*c*) The land thus withdrawn from sale and location was not subject to pre-emption, and no rights could be acquired by settling upon it or filing a declaratory statement.

Wilcox v. *Jackson*, 13 Pet. 498, decided that land reserved by executive authority for military purposes was not subject to pre-emption, and that an order of the Commissioner of the General Land Office directing such a reservation at the request of the Secretary of War was legally effective.

Bullard v. *Des Moines & Fort Dodge Railroad*, 122 U.S. 167, applied the same rule. Congress having granted land to the State of Iowa to aid in the improvement of the Des Moines river, a dispute arose as to the extent of the grant. This court, at December Term, 1859, decided that lands above the Raccoon Fork were not included in the grant. After this decision the Commissioner of the General Land Office directed the local land officers in Iowa that those lands should "continue reserved," because such action was "deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers holding under titles from the state." This court held that no right to these lands could be acquired by settlement thereon for the purpose of pre-emption while this reservation continued.

Mr. Justice MILLER, delivering the opinion of the court, said, —

"If the lands were at the time of these settlements and pre-emption

declarations effectually withdrawn from settlement, sale, or pre-emption by the orders of the Department, which we have considered, there is an end of the plaintiff's title, for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the act of 1862, and no title could be initiated or established, because the Land Department had no right to grant it." 122 U.S. 176.

In *Riley* v. *Wells*, reported in Lawyers' Co-operative Reports, book 19, page 648, the court held that the same lands dealt with in the case last cited were not subject to pre-emption before the order there referred to, and prior to the decision that they were not included in the grant to the State of Iowa, because the Land Department had directed that they should be withdrawn from sale and location pending the dispute as to the real extent of the grant.

In *Wolsey* v. *Chapman*, 101 U.S. 755, 768, 769, Chief Justice WAITE, delivering the opinion of the court, said, —

"It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the act of 1841. They were reserved also in consequence of the act of 1846. The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley* v. *Wells*, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal."

Hamblin v. *Western Land Co.*, 147 U.S. 531, 536, applied the same rule. Mr. Justice BREWER, delivering the opinion of the court, said, —

"In the first place, whether the location of the line in 1869 was of any validity or not, it was in fact accepted by the Land Department, and by the letters of March 15 and May 11, 1870, the land in contro-

versy was, with others, withdrawn to satisfy the grant as determined by that location, and such a reservation by the Interior Department, it is well settled, operates to withdraw the land from entry under the pre-emption or homestead laws."

A legislative construction of the law in accord with these decisions is found in the act of March 27, 1854, 10 Stat. 269, entitled "An Act for the Relief of Settlers on Lands Reserved for Railway Purposes," which provided —

"That every settler on public lands which have been or may be withdrawn from the market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them, *Provided*, they shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior." . . .

This act was evidently deemed necessary to allow pre-emption of lands withdrawn from the market by executive order, and it limited the right to settlers who had settled on the land before its withdrawal.

This court has never sustained a title by pre-emption acquired while the land sought to be pre-empted was reserved from sale.

In *Cedar Rapids &c. Railroad Co.* v. *Herring*, 110 U.S. 27, where the land was held to be open to pre-emption settlements, no withdrawal had in fact been made.

In *Hastings & Dakota Railroad Co.* v. *Whitney*, 132 U.S. 357, and *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U.S. 629, the entry was made before the grant, and the decision was merely that its subsequent rejection or abandonment did not make the land subject to the grant.

2. The land was not excluded from the operation of the first section of the act of 1864 by reason of its falling within the indemnity limits of the act of 1856, or by reason of the withdrawal of lands made by the Land Department to meet that grant.

The very object of the act of 1864 was to induce the construction of railroads which the aid offered by the act of 1856 had proved insufficient to promote. The reason of the grant, and the language used, concur in showing that it was intended to include this land without regard to the prior grant and the acts performed in pursuance thereof. The grant was of "every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by act of congress" of June 3, 1856, with indemnity limits of twenty miles. Obviously it was not the intention of Congress to exclude from this new grant in place the indemnity lands attached to the earlier grant made to the same grantee in aid of the same enterprise, or to allow the action of the Land Department in administering the earlier grant to have that result.

In *Barney* v. *Winona & St. Peter Railroad Co.*, 117 U.S. 228, this court dealt with a similar grant to the State of Minnesota. Congress, by act of March 3, 1857, 11 Stat. 195, had granted six alternate sections per mile to the State of Minnesota, with indemnity limits of fifteen miles. By act of March 3, 1865, sec. 1, 13 Stat. 526, Congress provided that the amount should "be increased to ten sections per mile." The act contained (sec. 3) the usual proviso excluding lands reserved to the United States. The court held that the act of 1865 was a grant of land in place comprising the four tiers of sections adjacent to the six tiers granted by the act of 1857.

Although the language used in the grant to Wisconsin by the act of May 5, 1864, was different from that used in the grant to Minnesota, it is clear that Congress intended its grant to Wisconsin to operate in substantially the same manner, that is, to confer upon the beneficiaries of the grant the alternate sections in the ten tiers adjacent to the roads on each side, in place of the six tiers affected by its earlier grant.*

* We beg leave to refer to the brief for the plaintiff in error in the case of *Wisconsin Central Railroad Co.* v. *Forsythe*, argued at this term, pages 39 to 54, for

3. If the land in dispute was excluded from the grant made by the third section of the act of May 5, 1864, the Omaha Company became entitled to all of it.

The only grounds for excluding the land in dispute from the grant made by section 3 of the act of May 5, 1864, are that it was reserved by virtue of the earlier grant made by the act of June 3, 1856, and by the proceedings thereunder of the Land Office. The Secretary of the Interior, on January 24, 1890, decided that upon these grounds the Central Company could not take any land within the indemnity limits fixed by the act of 1856 and covered by the withdrawal of lands made pursuant to that act (10 Land Decisions, p. 63; Record, p. 19). The basis of this decision was that by section 6 of the act of May 5, 1864, Congress had excepted all land within those limits from the grant made by section 3 of the act, although such exception did not extend to the grant made by section 1 of the act. The correctness of this decision as to the scope of the grant in section 1 of the act cannot be doubted. Assuming that it was equally correct in excluding the land from the grant made by section 3, it necessarily follows that all of the land, and not merely an undivided half, passed under the first section. A different view was, however, taken by the Secretary of the Interior, who, on December 19, 1890, ruled that the Omaha Company was entitled only to half of the land within the overlapping ten miles limits of its grant and the Central Company's grant (11 Land Decisions, 607; Record, p. 24).

It is impossible to support this decision. The only ground for limiting the grant to the Omaha Company to one half of this land would be either that the United States had reserved the other half from the grant, or had, by making contemporaneous grants, made the respective beneficiaries tenants in common, upon the principle laid down in *St. Paul & Sioux City Railroad Co.* v.

a more extended argument to show that the lands within the indemnity limits of the act of 1856, and the withdrawal thereunder, were not excluded from the grant made by section one of the act of 1864.

Winona & St. Peter Railroad Co., 112 U.S. 720, and similar cases.

There can be no pretence that one undivided half of this land was "reserved," or otherwise excluded from the grant to the Omaha Company expressly or by implication. The land was confessedly public land at the time the act of 1864 was passed, and at the time the Bayfield Branch was definitely located under that act. It was confessedly covered by the grant to the Omaha road unless excluded from the operation of the act of May 5, 1864, by the grant in the act of June 3, 1856, and the withdrawal by the Land Department. But it is admitted that the act of 1856, and the withdrawal under it for indemnity purposes, did not operate as a reservation from the new grant for the Omaha road made by the act of 1864. If, then, the first section of that act had contained the only grant made thereby, including this land within its limits, it could not have been disputed that the Omaha road was entitled to all, instead of to an undivided half only.

The sole ground, therefore, on which the grant to the Omaha Company can be reduced to an undivided half of the land in question is that, the United States having given the same land to the State for two companies, the two are to be deemed tenants in common. This, however, involves the proposition that the land was granted by the act of 1864 for the benefit of some other company as well as the Omaha Company, and the Central Company, provided for by section 3 of that act, is the only other company to which such a contemporaneous grant can have been made. By the hypothesis, however, this land was expressly excluded from the grant made by section 3, as being land reserved to the United States. There was, therefore, no other contemporaneous grant, and no co-tenant to share the land with the Omaha Company. The conclusion necessarily is that the latter company became entitled to the whole of this land as the sole beneficiary of the State and of the United States.

This conclusion alone is consonant with justice and reason, and with what must have been the intention of Congress. No ground

can be conjectured upon which Congress should have retained an undivided half of this particular land. It was the plain intention of the act to increase the grant for the benefit of the roads provided for in the act of 1856, by the addition of four sections in place and five sections of indemnity lands. In this act, as in other similar acts, if there was a conflict between two contemporaneous grants, it would be natural to impute to Congress the intention to benefit the recipient of each equally; but in the absence of such a conflict, there is no ground for imputing an intention to reduce the grant, because under different circumstances there might have been such a conflict. In the present instance the only reason for excluding the Central Company from a share of the land within the overlapping limits is that Congress did not intend to grant to it land "already dedicated to the Omaha Company." It requires a singular process of reasoning consistently with this to deduce an intention on the part of Congress to limit its grant to the Omaha Company as if it had made such a contemporaneous grant for the Central Company from this very land. The position taken by the Secretary of the Interior that the Central Company is to be excluded because the land was excluded from the grant to it, and that the Omaha Company takes but half the land, because the Central Company would have taken the other half if it had not been excluded, is a vicious circle of reasoning that defeats the obvious intention of Congress to give all this land to the State to aid in the construction of railroads.

In *United States* v. *Burlington &c. Railroad Co.*, 98 U.S. 334, 341, this court said, approving the construction given by the court below to the overlapping grants made to the Union Pacific and to the Burlington and Missouri River Railroad companies, —

"'This view,' as the presiding justice of the Circuit Court justly observes, 'would commend itself to Congress by its intrinsic equity, for by it each road gets the largest quantity of land which the statute permits' . . ."

In striking contrast to this "intrinsic equity" is the attempt in the

present case by an artificial and inconsistent construction to deprive both roads of land which, it cannot be seriously doubted, Congress designed to benefit either one or the other.

4. If the land in dispute was not excluded from the grant made by the third section of the act of May 5, 1864, the Omaha Company and Central Company were entitled to the land as tenants in common.

In the case of *Wisconsin Central Railroad Co.* v. *Forsythe*, argued at this term, it was contended that the grant made in section 3 of the act of May 5, 1864, included the land within the indemnity limits of the earlier grant, and within the withdrawal made pursuant thereto. It is not, as has been shown, important to determine that question in this case, but if, as is respectfully submitted, that is the true construction of that grant, the plaintiff in error in the present case is still entitled to recover.

If the same act makes grants for different railroads, and the place limits of the grants overlap, the beneficiaries are entitled to the lands within the overlap as tenants in common, without regard to priority of location or construction.

> *St. Paul & Sioux City Railroad Co.* v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720.
> *Sioux City & St. Paul Railroad Co.* v. *Chicago &c. Railway Co.*, 117 U.S. 406.

In *Donahue* v. *Lake Superior &c. Co.*, 155 U.S. 386, 387, this court said, with reference to such a grant, —

"By the original act of June 3, 1856, grants of land were made in aid of the construction of two roads, — one from Marquette to the state line, and one from Ontonagon to the state line. These grants were bestowed by the state of Michigan, separately, on the Marquette and Ontonagon companies. The rule is that where two lines of road are aided by land grants made by the same act, and the lines of those roads cross or intersect, the lands within the 'place' limits of both, at the crossing or intersection, do not pass to either company in perference to the other, no

matter which line may be first located, or road built, but pass in equal undivided moieties to each."

Applying the principles there laid down to the present case, it follows that, under the act of May 5, 1864, and the legislation of the State of Wisconsin in respect thereto, the land within the overlapping place limits of the Omaha Company and the Central Company passed to the State for the benefit of the two companies in undivided moieties.

II.

The plaintiff has acquired all rights to the land in dispute arising under the act of May 5, 1864, and holds a good title.

1. An indefeasible title vested under the act of May 5, 1864, when the roads for which the grant was made were completed in compliance with its terms.

The act of May 5, 1864, made a grant *in præsenti*.

Schulenberg v. *Harriman*, 21 Wall. 44.

No selection was necessary as to the land in dispute because, being within the place limits of the grant, the title became fixed upon the definite location of the roads for which the grant was made, and became indefeasible upon the completion of that part of the road coterminous with the land, in compliance with the requirements of the act.

"When the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute."

Ryan v. *Railroad Co.*, 99 U.S. 382, 386.

Upon the completion of the road the place land became taxable as its property without any further action by the United States.

Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.

The patents from the United States contemplated in section 7 of the act, while important as documentary evidence, were not essential to the complete transfer of title: the act itself was a grant in a solemn form.

Langdeau v. *Hanes*, 21 Wall. 521.
Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.
Deseret Salt Co. v. *Tarpey*, 142 U.S. 241.

Speaking of the grant made to the Central Company by this very act, this court said, in the case of *Wisconsin Central Railroad Co.* v. *Price County*, *supra*, —

"The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven forty-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it." 133 U.S. 510.

Whether upon the true construction of the act the grant was for the exclusive benefit of the Omaha Company or for its benefit jointly with the Central Company, is immaterial in this connection. In either event, an absolute title in each odd-numbered section within the place limits vested upon the completion of both roads. If that title was in the two companies as co-tenants, it was none the less an absolute title as to each section or fraction of a section granted. The division between the co-tenants was a matter concerning them, and did not retard the final vesting of the title or the absolute quality of their rights under the grant.

2. All title to the land in dispute under the act of May 5, 1864, has been conveyed to the plaintiff.

(*a*) If the land was granted for the ecxlusive benefit of the Omaha Company, that company could by its deed convey the land

at will. Nothing was required after the completion of its road in 1882 to complete its title.

On June 24, 1885 (Record, p. 18), the Omaha Company conveyed this land to the plaintiff, and that deed transferred to him a good title if upon the true construction of the act the Omaha Company alone was entitled to the land.

(*b*) If the land was granted for the benefit of the Omaha Company and Central Company jointly, the plaintiff still acquired a good title under the deed from the Omaha Company.

If the Omaha Company was not as to the land in dispute the sole beneficiary of the act of May 5, 1864, it was entitled to the land jointly with the Central Company in undivided moieties, and by the agreement between the two companies and the patent from the State, the Omaha Company became vested with a good title, which in turn it conveyed to the plaintiff.

It is clear that the construction put upon the act by the corporations interested and by the State of Wisconsin was that both of the companies were interested in the land within the overlapping place limits of their grants. In order to adjust these conflicting interests, the companies entered into the agreement of February 12, 1884, defining their respective rights (Record, p. 19). This agreement was, in fact, a partition between the two co-tenants. It provided in section 1, " that the Central Company shall have " certain parts, and by other provisions that the Omaha Company should have certain other parts, of the lands lying in common.

The method of carrying out this partition was provided for in the agreement, and was in accordance with the usual practice in similar cases. The State of Wisconsin to which the grant had been made, was to effect the division by issuing patents for the different parcels of land in accordance with the terms of the agreement, and this was in fact done. Speaking of this agreement, and of its performance, Secretary Noble said, —

" Being thus within the lapping limits of two grants made by the same act, at the time of the alleged contract between the two companies, it was evidently supposed that each was entitled to one undivided moiety

of said lands, and that, as usual, a patent for the whole would be issued to the State which would make division between the companies. The contract, then, seems to have been made with a view to promote the amicable and just division of said lands between the parties entitled; and in listing the lands within the granted limits, it was proper that the Omaha Company should claim each of the designated sections, of which it supposed it was entitled to the undivided half, being then without authority of law to pick out particular tracts as its one half of the grant." 11 Land Decisions, 613; Record, p. 24.

The effect of these various instruments was to vest in the plaintiff, Henry F. Spencer, all the title to this land derived under the act of May 5, 1864. The Central Company by its agreement with the Omaha Company consented to an actual division of the common property by which the title to this part should be vested in Spencer; the State of Wisconsin by its patent sanctioned this arrangement, and conveyed its bare legal title to the Omaha Company for that purpose; the Omaha Company by its deed and by its agreement with the Central Company transferred to Spencer all its rights in the land; the United States, upon the full performance of the terms on which the grant was made, ceased to have any rights in the land or any interest in or control over its disposition.

Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.

If, therefore, the land in dispute was included at all in the grant made by the act of May 5, 1864, the plaintiff in error had when this suit was brought a perfect and complete title to it.

3. The action subsequently taken by the Land Department could not affect the title acquired by the plaintiff.

The officials of the Land Department, and the Secretary of the Interior on appeal, took the view that the Central Company was wholly excluded from this land, and that the Omaha Company was entitled only to an undivided half of it. This view was acted upon in the final adjustment of the grant, and the Land Depart-

ment refused to list the premises now in dispute to the Omaha Company as part of its grant. The reasons for this action were set forth by Secretary Noble as follows: —

"But when afterwards that grant came before this Department for adjustment, and it was held in effect, as shown in the cases heretofore cited, that the Wisconsin Central could not go within fifteen miles of the Omaha road for any lands whatever, because the lands within those limits were reserved from the Central grant, a different condition from the ordinary lapping of the granted limits of two roads under the same grant was presented; and it was held, under these circumstances, that the Omaha Company was only entitled to the one undivided half of the lands within said granted limits, and that the other half belonged to the government. Therefore it being impossible to issue for the benefit of said company a patent for an undivided moiety of said lands, or patent to the State for the whole for the joint benefit of said company and the United States, it became necessary to reject the former lists, presented by the company, and to require it to specify particular tracts, which in the aggregate would amount to one half of the lands within its granted limits so that patents conveying full title to the same might be issued therefor." 11 Land Decisions, 613.

It is clear that the course pursued was based upon a construction, as matter of law, of the act of May 5, 1864, which, as has already been contended, cannot be supported. If that construction was erroneous, the decision of the Secretary and the action taken were founded on an error of law, and cannot affect any rights under the grant, or in any way impair the plaintiff's title. *St. Paul & Sioux City Railroad Co.* v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720, 733.

In *Dubuque & Pacific Railroad Co.* v. *Litchfield*, 23 How. 66, it was decided that the erroneous construction of a legislative grant by the executive, and action taken pursuant thereto, was of no effect in determining the right to land claimed by one deriving title from such grant.

In *Homestead Company* v. *Valley Railroad*, 17 Wall. 153, 164, the same rule was applied.

In *Shepley* v. *Cowan*, 91 U.S. 330, 340, this court, in speaking of the effect to be given the decision of the officials of the Land Department said, —

"If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

The same principle is laid down in *Cunningham* v. *Lake Superior &c. Co.*, 155 U. S. 354, 375.

The action of the Department in finally adjusting the grant upon this erroneous construction is not, therefore, binding upon the Omaha Company or upon third persons claiming under it. If, in consequence of the error, other lands were selected and listed to the Omaha Company to which it was not in fact entitled, this does not affect the plaintiff's title. The final adjustment by the Department of the grant to the Omaha Company was made in 1890 (11 Land Decisions, 607; Record, p. 24). The land in dispute had been conveyed by the Omaha Company to the plaintiff five years before. Whether this conveyance, independently of the concurrence of the Central Company, would have conveyed all or only an undivided half of the land is immaterial; the Omaha Company at the time had a transmissible interest in this particular section as part of its place lands, and its grantee could not subsequently be deprived thereof by the action of the Land Department. If, through that action, land has been listed to the Omaha Company to which it was not entitled, that, and not this, is the land the title to which is defective.

III.

The plaintiff can enforce his rights in this action.

The plaintiff can maintain an action at law although no patent has been issued by the United States.

It has already been shown that a patent is not necessary to

complete a title derived by direct legislative grant from the government. A title so acquired is sufficient to support an action to assert the rights of the grantee as well as for all other purposes. If a patent has been issued to an adverse claimant, one deriving title from such a legislative grant may bring suit in equity to have the patentee declared a trustee for him, and ordered to convey to him.

Van Wyck v. *Knevals*, 106 U.S. 360.
Walden v. *Knevals*, 114 U.S. 373.

If the patentee brings an action of ejectment against one deriving title from such a grant, the latter may defend his possession by showing the priority of the grant.

Whitney v. *Morrow*, 112 U.S. 693.
Doolan v. *Carr*, 125 U.S. 618.

If one claiming under such a grant is himself out of possession, he may maintain an action at law to recover possession.

Grinnell v. *Railroad Co.*, 103 U.S. 739.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

HENRY F. SPENCER,
PLAINTIFF IN ERROR,

vs.

ALEXANDER McDOUGAL,
DEFENDANT IN ERROR.

Term No. 245

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF FOR DEFENDANT IN ERROR.

GEO. G. GREENE,
Attorney for Defendant in Error.

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HENRY F. SPENCER,
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ALEXANDER McDOUGAL,
DEFENDANT IN ERROR.

No. 245.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The first section of the Act of June 3, 1856 (11 U. S. Stat. 20), granted to the State of Wisconsin in aid of a railroad to the west end of Lake Superior and a branch to Bayfield, the odd sections within six miles on each side of the main line and branch, and right of indemnity from odd sections within fifteen miles on each side of each. Before the definite location of either main line or branch, the Commissioner of the General Land Office, by telegram of May 29, 1856, and by letter of June 12, 1856, in aid of the grant, directed the reservation from sale or location, of all lands in the State. On October 26, 1856, he directed the local officers, "*upon the filing* * * *

"*of a duly certified map of the line of route, as definitely* "*fixed,* of any of the roads referred to in" said Act, to "cease to permit locations by entries or pre-emption, for "any purpose whatever, of the land within fifteen miles "of said route" (pp. 12, 13, print. rec.). The map of definite location of the Bayfield branch was filed July 17, 1858 (p. 8, print. rec.). The only withdrawal for such branch, after such location, was March 1, 1859 (p. 13, print. rec.). The land demanded is outside the place and within the indemnity limits of the Bayfield branch, and was unoffered until January 8, 1891. On May 3, 1858, one Cooper filed his pre-emption declaratory statement on part of the land, and on June 16, 1858, one Mantshke filed such statement on the rest of it (pp. 24 to 30, print. rec.).

The first section of the Act of May 5, 1864 (13 U. S. Stat. 66), increased the place grant of the first section of the Act of 1856 to ten miles, and its indemnity limits to twenty miles. The third section of the Act of 1864 granted to the State, in aid of another road, the odd sections within ten miles on each side of its line, and indemnity from the odd sections within twenty miles.

The roads mentioned in the first sections of the Acts of 1856 and 1864, including the Bayfield branch, were built, and the Chicago, Minneapolis, St. Paul & Omaha Railway Company, hereinafter called the Omaha Company, became the owner of all rights granted by those sections. The road mentioned in the third section of the Act of 1864 was built, and the grant of that section vested in the Wisconsin Central Railway Company, hereinafter called the Central Company. The Bayfield branch and the line of the Central Company encounter near Bayfield; so that the land in suit is within the additional four-miles place grant of the first section of the Act of 1864, in favor of

the Omaha Company, and the ten-miles place grant of its third section in favor of the Central Company. If the land had not been reserved from the grant of either section, it would have gone to the two companies in common. But the land had been pre-empted before the definite location of either road, and, if not pre-empted, it was within the withdrawal for the Bayfield branch made before the Act of 1864. The sixth section of the Act of 1864 provides: "Any and all lands reserved to the United " States by any Act of Congress, for the purpose of aiding " in any object of internal improvement, or in *any man-* " *ner* for *any* purpose *whatsoever*, * * * be, and they " are hereby, reserved and excluded from the operation " of this Act." In adjusting the grants of the Omaha and Central Companies, the Secretary of the Interior held that lands withdrawn for the roads mentioned in the first section of the Act of 1856, prior to the Act of 1864, were, by section six of the latter Act, excepted from the grant of its third section, but not from that of its first section; and that, hence, lands within both grants, but for the exception, belonged to the United States and the Omaha Company in common. That company was required to select lands equivalent in acreage to its moiety. The grants of both companies were adjusted on this basis, and the unselected land, including the land in suit, was, on January 8, 1891, restored to entry (pp. 28, 29, print. rec.).

The Chi., St. P., M. & O. Ry. Co., 11 Dec. Dep. Int. 607, 612.

The Wisconsin Central Co., 11 Dec. Dep. Int. 615.

The land in suit was never patented by the United States. On June 24, 1885, before the adjustment of either grant, the Omaha Company made a deed which purported to convey it to plaintiff in error.

I.

Its pre-emption, before definite location of the Bayfield branch, excluded the land in suit from the grants of 1856 *or* 1864.

Section one of the Act of 1856, after its grant, provides: "But in case it shall appear that the United States have, "*when the lines or routes of said roads are definitely fixed*, "sold any sections or part thereof, granted as aforesaid, "or that *the right of pre-emption has attached to the same*, "then it shall be lawful * * * to select * * * "from the lands of the United States" in the indemnity limits, enough to supply the deficiency. The first and third sections of the Act of 1864 make the same provision.

The route is not definitely fixed, within such enactments, until the map of definite location is filed in Washington.

Grinell v. *Ry. Co.*, 103 U. S. 739.
Van Wyck v. *Knevals*, 106 U. S. 360, 366.
Kans. Pac. Ry. Co. v. *Dunnemeyer*, 113 U. S. 629.
Land Co. v. *Griffey*, 143 U. S. 32.

Such map of the Bayfield branch was thus filed on July 17, 1858. Declaratory pre-emption statements were filed on this land, as aforesaid, on May 3 and June 16, 1858 (pp. 8, 24 to 27, print. rec.). There was no specific withdrawal for such road before definite location (pp. 12, 13, print. rec.). In the nature of things there could not have been. But there was a pretended *general* withdrawal of *all lands in the State* in aid of all the roads in the Act of 1856 made just before and just after that act was passed, viz., on May 29 and June 12, 1856 (p. 12, print. rec.).

Before the Act of July 14, 1870 (16 U. S. Stat. 279), the time for proof and payment of pre-emption claims on *unoffered* land was unlimited.

Randall v. *Ry. Co.*, 10 Dec. Dep. Int. 54.

Unless, therefore, the land in suit was withdrawn prior to the definite location of the Bayfield branch on July 17, 1858, its pre-emption before that date excluded it from the grants of 1856 or 1864.

Bardon v. *Ry. Co.*, 145 U. S. 535.
Land Co. v. *Griffey*, 143 U. S. 32.
Kans. Pac. Ry. Co. v. *Dunnemeyer*, 113 U. S. 629.
Winona & St. P. Ry. Co. v. *Barney*, 113 U. S. 618.
Hastings, etc., Ry. Co. v. *Whitney*, 132 U. S. 357.
Cattle Co. v. *Becker*, 147 U. S. 47.
U. S. v. *So. Pa. Ry. Co.*, 146 U. S. 615.
Leavenworth, etc., Ry. Co. v. *U. S.*, 92 U. S. 733.

The fact of pre-emption by this doctrine must be ascertained from *the record*.

Whitney v. *Taylor*, 45 Fed. Rep. 616.
Land Co. v. *Griffey*, 143 U. S. 32.
Ry. Co. v. *Dunnemeyer*, 113 U. S. 629.
Bardon v. *Ry. Co.*, 145 U. S. 535.

It would be impossible, in adjusting such grants, or in dealing with lands within their limits, to know certainly which lands were pre-empted at the time of definite location, so as to be excluded from the grants, save from the record. The filing and entry of the declaratory statement *is* the record.

Malone v. *Ry. Co.*, 7 Dec. Dep. Int. 13.
Randall v. *Ry. Co.*, 10 Dec. Dep. Int. 54.
Boyer v. *Ry. Co.*, 10 Dec. Dep. Int. 568.
Northern Pacific Ry. Co., 10 Dec. Dep. Int. 645.

Ry. Co. v. *Larson*, 3 Dec. Dep. Int. 305.
Millican v. *Ry. Co.*, 7 Dec. Dep. Int. 85.
Payn v. *Ry. Co.*, 7 Dec. Dep. Int. 405.
Ry. Co. v. *Wiley*, 7 Dec. Dep. Int. 354.
Ry. Co. v. *Lewis*, 8 Dec. Dep. Int. 292.
Ry. Co. v. *Haines*, 9 Dec. Dep. Int. 595.
Central Pac. Ry. Co., 11 Dec. Dep. Int. 195.
Graham v. *Ry. Co.*, 1 Dec. Dep. Int. 382.
Ry. Co. v. *Forsythe*, 3 Dec. Dep. Int. 446.
Ry. Co. v. *U. S.*, 3 Dec. Dep. Int. 479.
Ry. Co. v. *Whitenall*, 4 Dec. Dep. Int. 249.

Many of these decisions are cited with approval in *Hastings, etc., Ry. Co.* v. *Whitney* (132 U. S. 357). This case reiterates the familiar doctrine that a rule of the Land Department, applied so long and so frequently, on which so many titles rest, is of almost conclusive force.

The only question, then, is, did the withdrawals of all lands in the State, before definite location of the route, prevent these pre-emption claims from attaching? Under statutes, in the same language as the first section of the act of 1856, the right of pre-emption is held to continue until definite location. Hence, it cannot be defeated by withdrawal before that event.

Winona & St. P. Ry. Co. v. *Barney*, 113 U. S. 629.
Land Co. v. *Griffey*, 143 U. S. 32.
Kansas Pacific v. *Atchison Ry.*, 112 U. S. 414.
Cedar Rapids Ry. v. *Herring*, 110 U. S. 27.
Van Wyck v. *Knevals*, 106 U. S. 360.
Wis. Cent. Ry. Co. v. *Price Co.*, 133 U. S. 496.

In the Barney case, the Court said: "It was not for the "interest of the country that any portion of the public "lands should be withheld from sale and settlement, be-

" cause, when the routes of the road were definitely de-
" termined, they *might* be within the limits of the grants."
Like language was used in the Griffey case, where there seems to have been a general withdrawal on the day the Act was passed. (See *Wolcott* v. *Nav. Co.*, 5 Wall. 681, 688.) If the right of pre-emption thus continues to definite location, the Land Department cannot defeat it. In *Kansas P. Ry.* v. *Atchison Ry.* (112 U. S. 414), the Commissioner, before definite location, withdrew all public lands within the " probable lines " of the road. The Court said: " The
" order of withdrawal of lands along the ' probable lines '
" of the defendant's road * * * affected no rights
" which without it would have been acquired to the lands,
" nor in any respect controlled the subsequent grant."

The map of definite location of the Bayfield branch was filed *July* 17, 1858 (p. 8 print. rec., map). The endorsement on the general diagram map recites that " *after the definite location of the roads*, under date of *March* 13, 1858, diagrams were transmitted," etc. (p. 11, print. rec.). The seeming contradiction is explained thus: The map of definite location of the line from Madison to St. Croix was filed September 7, 1857; that of the line from St. Croix to the west end of Lake Superior March 2, 1858; and that of the Bayfield branch July 17, 1858.

Wisconsin Cent. Ry. Co. v. *Forsythe*, 43 Fed. Rep. 867, 872.

Wisconsin Cent. Ry. Co., 10 Dec. Dep. Int. 63, 65.

The diagrams sent, under date of March 13, 1858, by the above recital were, therefore, sent *after* the filing of the maps of September 7, 1857, and March 2, 1858, but not after the location of the Bayfield branch. This conclusively appears from the map of the location of the branch, which is the best evidence; from the recital in

the endorsement (p. 11, print. rec.), that part of the line was not located *in the field* until June 10, 1858; and from the diagram map itself, which shows the date of location in the field, and, we think, of the filing of the map of definite location of the branch (p. 11, print. rec., map).

II.

If the land in suit was not thus excluded from grant by its pre-emption, it still belongs to the Government by the acts of 1856 *and* 1864 *and the adjustment of their grants.*

The Central Company could not come within the withdrawal in favor of the Omaha Company, under the act of 1856, to gratify any part of its grant.

Omaha Company, 11 Dec. Dep. Int. 607.
Central Company, 10 Dec. Dep. Int. 63.
Central Co. v. *Forsythe*, 43 Fed. Rep. 867.

Hence, the moiety of the land common to the four-miles-additional grant of the first section of the act of 1864, and the ten-miles grant of its third section, which would have gone to the Central Company but for the withdrawal, was excluded from its grant. What became of it? Did it fall into the grant to the other company or remain in the grantor? In adjusting the grants, Secretary Noble held that it remained in the United States, and that only the other moiety vested in the Omaha Company. On this ruling that company selected lands equivalent in acreage to its moiety, its grant was fully adjusted, and the land in suit, with other unselected land, was restored to entry (pp. 28 29, print. rec.).

Omaha Company, 10 Dec. Dep. Int. 148.
Omaha Company, 11 Dec. Dep. Int. 607, 612.
Central Company, 11 Dec. Dep. Int. 615.

This decision is on the ground that, in a conveyance to two or more jointly, an exception of part of the premises, as to one of the grantees only, leaves the excepted interest in the grantor. On a deed to A and B, without exception, they are tenants in common; but, if part of the land be excepted as to B only, the excepted interest does not fall into the grant to A, but remains in the grantor. Had Congress, by a single granting clause, granted certain lands to the two companies, but excepted some specific tracts from the grant as to the Central Company, the Government and the Omaha Company would have owned the excepted tracts in common. The Secretary held the Act of 1864 equivalent to such grant. He said: "When "afterwards that grant [1864] came before this Depart- "ment for adjustment, and it was held, in effect, as shown "by the cases heretofore cited, that the Wisconsin Central "could not go within fifteen miles of the Omaha road for "any lands whatever, because the lands within those limits "were reserved from the Central grant, a different con- "dition from the ordinary lapping of the granted limits "of two roads under the same grant was presented; and "it was held, under these circumstances, that the Omaha "Company was only entitled to the one undivided half of "the lands within said granted limits, and that the other "half belonged to the Government. Therefore, it being "impossible to issue for the benefit of said company a pat- "ent for an undivided moiety of said lands, or a patent to "the State for the whole for the joint benefit of said com- "pany and the United States, it became necessary to reject "the former lists, presented by the company, and to re- "quire it to specify particular tracts, which in the aggre- "gate would amount to one-half of the lands within its "granted limits, so that patents conveying full title to the "same might be issued therefor. The adjustment has

" been made on these principles; lists have been pre-
" pared and approved for patent, and the adjustment is
" [December 19, 1890] practically closed " (11 Dec. Dep. Int., 613, 614). The decision is right.

Second. The decision cannot be challenged in this action. At the date of the above ruling, December 19, 1890, the adjustment was "practically closed." By April 18, 1891, it was formally completed, all withdrawals revoked, and all unselected land, including that in suit, was restored to entry. To reopen the adjustment must avoid much action on its faith. On policy and principle a land-grant adjustment is not thus inconclusive.

Under a grant *in præsenti* to a single company, the Secretary of the Interior has, in general, only a *ministerial* duty to perform in patenting the place lands. But the peculiar conflict of these grants, their exceptions and the withdrawals in their aid, presented difficult questions of law and fact within his jurisdiction to decide. His decisions of them were *judicial*. The seventh section of the Act of 1864 compelled him to decide those questions, and the Act of May 3, 1887 "*directed*" him "to immedi-
" ately adjust, in accordance with the decisions of the
" Supreme Court, each of the railroad grants made by
" Congress to aid in the construction of railroads, and
" heretofore unadjusted " (24 U. S. Stat. 556). When, under this mandate, he *has* adjusted a grant on the basis of his judicial rulings within his power to make, and the railroad company has taken its patents pursuant to the adjustment in full satisfaction of its grant, those who may have taken transfers from the company before adjustment may not severally challenge it in the Courts. The eighth section of the Act of 1864 gives power of disposal by the railroad companies only after patent. As patent must follow adjustment, this secures an adjustment *with the*

companies. Whoever takes a transfer from a company before adjustment takes subject to the Secretary's power to adjust. If not so, there is no force to an adjustment. Companies may swap and jockey lands before adjustment, when their claims are disputed or doubtful, as they did here, or may transfer tracts to numberless purchasers; get from the Land Department the best adjustment they can, and they or their assigns then go into the Courts and challenge every adverse ruling of the Department. An adjustment of a railroad grant, involving often a multitude of interdependent questions of law and fact, has its advantages and disadvantages, its losses and compensations to the company. If, when the principles on which it went gave land to the Government, the railroad company or its assigns may impeach them for error in any Court of appropriate original jurisdiction, State or Federal, so may the Government or claimants under it, if the rulings give the land to the railroad company.

In *Houlton* v. *Chicago, St. P., M. & O. Ry.* (17 Dec. Dep. Int. 437), on application for leave to sue, Mr. Secretary Smith said: "The adjustment of this grant [Omaha] "was under consideration by this Department for a num- "ber of years, and decisions relating thereto are to be "found in 6 L. D. 195; *ib.* 209; 9 L. D. 465; *ib.* 483; "10 L. D. 86; *ib.* 147; 11 L. D. 607; 12 L. D. 259. "Few grants have been more carefully considered, or "more completely adjudicated. Under the decisions re- "ferred to, *after making all proper allowances to the com- "pany and deduction from its claims*, a surplus of nearly "200,000 acres of land remained unappropriated within "its indemnity limits. This surplus was restored to the "public domain, and most, if not all of it, has been "entered under homestead laws." Citing the Act of 1887, the Secretary continues: "Though the adjustment

"of this grant was commenced under Mr. Secretary "Lamar prior to the passage of the above Act, it was "proceeded with and completed by Mr. Secretary Noble "thereunder. * * * The adjustment Act of March 3, "1887, before cited, evidently contemplates the final ad- "justment and formal closing of the railroad grants, after "which they shall not again be reopened. The first sec- "tion directs the adjustment of all grants, 'heretofore "'unadjusted,' and the second section speaks of the 'com- "'pletion' of the adjustment ordered to be made by the "Act. * * * This adjustment was acquiesced in by "the company and, unquestionably, *if it applied to have "said adjustment reopened for the purpose of presenting "claims for more land, the finality of the departmental "action would be a sufficient reason for denying the appli- "cation.* The Department itself promptly acted on its "formal declaration, revoked the indemnity withdrawals "which up to that time had reserved the lands within "their limits for the exclusive benefit of the grant, and "opened the surplus lands to entry under the general "land laws. If, under these circumstances, the company "would be debarred from making further claims, unques- "tionably the Government should, in good conscience, "be estopped from opening the adjustment so formally "closed." And as the adjustment was required by law, the company could not impair its force by prior transfer of lands, its right to which was a judicial question within the power of the Secretary to decide in such adjustment.

Even in the ordinary disposal of the public domain, where the power of decision is merely incidental to that of disposal, and reversal only affects the litigants, *judicial* rulings of the Department within its jurisdiction are conclusive in a collateral action at law. Equity will relieve

against a mistake of law, if it is *clear* and unmixed with any mistake of fact.

Smelting Co. v. *Kemp*, 104 U. S. 641.
Johnson v. *Towsley*, 13 Wall. 72.
Quimby v. *Conlan*, 104 U. S. 420.
Marquez v. *Frisby*, 101 U. S. 473.
Mining Co. v. *Same*, 34 Fed. Rep. 515.

The reasons for conclusiveness of the Secretary's decisions, in the adjustment of railroad grants, are much stronger. The thing he is specifically commanded to do—"to *adjust*"—imports *finality*. It is signified by the terms of the statute. The interests of the Government and the people demand it; for as often as the adjustment is opened, the Government may be subjected to new liabilities, and the action of the people on its faith may be invalidated.

III.

Irrespective of the foregoing contentions, plaintiff in error has no title sufficient to sustain this action.

He claims title under the additional place grant of the first section of the act of 1864. The words of present grant in that section are restrained by the seventh and eighth sections. The seventh section declares that, on the completion of each consecutive twenty miles of road, "patents shall issue *conveying the right and title* to said lands *to said company* entitled thereto * * * coterminous with said completed section." Eighth section: "The lands hereby granted shall, *when patented* as provided in section seven of this act, be subject to the disposal of the companies entitled thereto."

With power to dispose of the lands only when patented,

the Omaha Company could not dispose of them to plaintiff in error before either patent or adjustment. If before patent it could convey any interest, it was only the equitable title. In *Wis. Cent. Ry. Co.* v. *Price Co.* (133 U. S. 496) such lands were held taxable. On that question it was said to be "immaterial whether it be held that the company then [before patent] had a legal and *defeasible* title to the lands, or merely an *equitable title to them* to be subsequently perfected by patents from the Government." The case was likened to that of land entered by private entry and fully paid for, but not patented; which had been held taxable, because the entryman had an indefeasible right to a patent, and the Government held the "*naked legal title in trust for the purchaser, who has the equitable title.*" Albeit land with title in that condition is taxable, the entryman cannot maintain ejectment for it. To sustain that action, plaintiff must have the legal title.

Jones v. *McAllister*, 20 How. 8.
Sherbourne v. *DeCordova*, 24 How. 423.
Langdon v. *Sherwood*, 124 U. S. 74.

In *Rice* v. *Ry. Co.* (1 Black, 358), the first section of an act granted land for a railroad *in præsenti*, but the fourth section provided that "no title shall vest * * * nor "shall any patent issue * * * until a continuous "length of twenty miles of said road shall be com- "pleted." The legal title was held not to pass. Are not the provisions that *patents shall convey the title*, and that *title shall not vest until patent*, equivalent?

When there is no such restriction of words of present grant, or it is merely provided that the patent shall *confirm* the title, the patent is only for further assurance.

St. P. & P. Ry. v. *North. Pac. Ry.*, 139 U. S. 1.

Ry. Co. v. *U. S.*, 92 U. S. 733.
Ry. Co. v. *Kansas Pac. Ry.*, 97 U. S. 491.
Ry. Co. v. *Baldwin*, 103 U. S. 426.

But *when the patent conveys the title* it is not an instrument of further assurance. At least the legal title must remain in the Government until patent.

U. S. v. *Childers*, 12 Fed. Rep. 586.
Ry. Co. v. *McShane*, 22 Wall. 444.
North. Pac. Ry. v. *Rockne*, 115 U. S. 600.
New Orleans P. Ry. v. *U. S.*, 124 U. S. 419.
Ry. Co. v. *Prescott*, 16 Wall. 603.

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